BRIEF FOR PETITIONER
PORT ANGELES TELECABLE, INC.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Case No. 22,627

PORT ANGELES TELECABLE, INC., *Petitioner*

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

KVOS TELEVISION CORPORATION, *Intervenor*

On Petition for Review of Memorandum Opinion and Order of the Federal Communications Commission

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BRIEF FOR PETITIONER PORT ANGELES TELECABLE, INC.

STATEMENT OF THE CASE

A. Jurisdictional Statement

This is a Petition for Review brought pursuant to Section 402(a) of the Communications Act of 1934, as amended, 66 Stat. 718, 47 U.S.C. § 402(a); pursuant to Section 10 of the Administrative Procedure Act of 1946, as amended, 60 Stat. 237, 5 U.S.C. § 702; pursuant to the Judicial Review

Act of 1950, as amended, 64 Stat. 1129, 28 U.S.C. § 2342; and pursuant to Rule 34 of the Rules of this Court. (R. 20 and 21).

B. Venue of the Proceeding

Petitioner, Port Angeles Telecable, Inc. of Port Angeles, Washington, a corporation organized in and operating under the laws of the State of Washington, with its principal office located in Port Angeles, Washington, the said State of Washington being within the Ninth Judicial Circuit, is subject to the venue of the Ninth Judicial Circuit pursuant to the Judicial Review Act of 1950, as amended, 60 Stat. 1129, 28 U.S.C. § 2343. (R. 21).

C. Relief Sought Below

This is a Petition for Review in which the Petitioner, Port Angeles Telecable, Inc., appeals from a Memorandum Opinion and Order of the Federal Communications Commission released January 23, 1968 (R. 0015), by which the Commission denied Petitioner's Request for Waiver (R. 0016) of the non-duplication provisions of Section 74.1103(e) of the Rules of the Commission (47 C.F.R. § 74:1103(e)), adopted March 8, 1966. (Attached to this Brief as Appendix A).

D. Introduction

Unlike AM radio signals which tend to hug the ground, television signals travel in a straight line. Because of the curvature of the earth, therefore, their normal range for good reception is limited to the horizon, usually a distance of around 70 miles. Moreover, the nature of the television signal is such that it is effectively blocked when it encounters hills or certain man-made structures.

Community antenna television (hereinafter CATV) first developed in localities where satisfactory television reception was not possible through the use of normal house top

ntennas, either because of the distance from transmitting tations or because mountainous terrain blocked the signals. he first commercial system was started about 1948.

Originally a CATV system consisted merely of an ntenna erected on a hill top and connected by cable or wire subscribing homes. Such systems are ordinarily escribed as "off-the-air" or "non-microwave" systems. here are some systems, however, which are too far from levision stations to receive the signals directly. They, herefore, rely on point-to-point microwave transmission relay the signals to them. A microwave transmitter tilizes a portion of the spectrum and therefore requires license from the Federal Communications Commission.

The CATV system in the instant case is a non-microwave stem, and all the signals which it carries are received rectly off the air from the television stations without use the spectrum. All of the signals can be received by the habitants of Port Angeles, Washington, with the use of oof-top antennas without resort to Petitioner's CATV stem. However, all television signals except the signal KVOS-TV can be viewed less well in certain sections of ort Angeles with the use of roof-top antennas because the Olympic Mountain range which severely impedes the ception of television signals from all United States tations except Television Station KVOS, Bellingham, ashington. (R. 0002). This means that the picture ailability of these other United States stations can be iproved generally for subscribers to Petitioner's CATV stem, because the antenna of the CATV system is placed a high elevation.

The history of the Federal Communications Commission's view of its authority over CATV systems is a ronicle of vacillation and contradiction. In 1959, approximately a decade after the advent of CATV operations, e Commission first considered the question and concluded at it was without such authority—whether the CATV

systems were "off-the-air" or fed by microwave. *CAT and TV Repeater Services,* 26 F.C.C. 403 (1959). C April 23, 1965, the Commission reversed its position wi respect to CATV fed by microwave and asserted jurisdi tion over such systems. *First Report and Order,* 38 F.C. 683 (1965). On March 8, 1966, the Commission complete reversed its earlier position and asserted authority ov non-microwave CATV systems also. *Second Report a Order,* 2 F.C.C. 2d 725 (1966).

This, in brief, is the record of the Commission's vie of its authority to regulate CATV. A more detailed stat ment of these successive positions and the bases relied up by the Commission is set forth below.

When the Commission first considered the question 1959, it expressly concluded that it had no power to regula CATV systems. In reaching this conclusion it considere among other arguments, the contention that it derived su regulatory authority over microwave CATV systems a should exercise it because of

> . . . the impact upon a television broadcaster of gra of radio facilities to a communications common carri where the common carrier facilities will be used for t purpose of providing communications service to a co munity antenna system operating in competition wi the broadcaster.

The Commission dismissed the contention as follows:

> In essence, the broadcasters' position shakes down the fundamental proposition that they wish us regulate in a manner favorable toward them vis-a-v any non-broadcast competitive enterprise. Thus, f example, we might logically be requested to invoke prohibition against access to common carrier faciliti by such enterprises as closed-circuit music and ne services, closed-circuit theater television operato and, possible, even ordinary motion picture a legitimate stage operators, magazine and newspap publishers, etc., comprising all of the entities whi

compete with broadcasting for the time and attention of potential viewers and listeners. *The logical absurdity of such a position requires no elaboration.* (26 F.C.C. at 431-32 (emphasis added)).

This view of the matter was not long-lived. In 1962 the ommission, on the basis of a protest initiated by a local levision station, denied an application of a common rrier by radio for permission to construct a microwave dio communications system to be used to transmit tele- sion signals to CATV systems serving three towns in yoming. It concluded that grant of the application would t serve the public interest because it would result "in te demise of the local television station and the eventual ss of service" to certain residents of the area which uld not be reached by CATV. However, the denial was ued without prejudice to refiling of the application if could be shown that the CATV operation would not plicate the programs carried by the local television tion and would also carry the signals of the local broad- sters. In reaching its conclusion, the Commission stated: To the extent that this decision departs from our views the Report and Order in Docket No. 12443, 26 F.C.C. 3 (released April 14, 1959), those views are modified." *rter Mountain Transmission Corp.*, 32 F.C.C. 459, 465 962), *aff'd sub nom. Carter Mountain Transmission Corration* v. *FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 35 U.S. 951 (1963). Thus the Commission took the first p in effectuating a program—which it had earlier jected as a "logical absurdity"—of protecting broad- sters against the economic competition of CATV.

The second step was to translate the action it had taken *Carter Mountain* into general rules. This was done on ril 23, 1965, when it released its *First Report and Order*, F.C.C. 683 (1965). There the Commission also stated t it had:

> . . . determined as an initial matter that the Communications Act vests in this agency appropriate rule

making authority over all CATV systems, includi
those which do not use microwave relay service (
so-called "off-the-air systems"). *Ibid.* at 684.

However, at that time it limited its asserted authority o
microwave CATV systems and deferred action with resp
to off-the-air CATV systems. Further, it simultaneou
issued a Notice of Inquiry and a Notice of Proposed R
Making[1] in order to develop "an appropriate recor
and to meet its "need for more definitive informatio
Ibid. at 685.

In the *First Report and Order* the Commission arti
lated its "belief that CATV service should supplement,
not replace, off-the-air television service." Ibid. at 7
The Commission asserted that duplication of broadc
program material by CATV systems in a local market fr
distant sources dilutes such audiences and is not "a fa
method of competition" or "consistent with CAT
appropriate role as a supplementary service." Ibid.
order "to create reasonably fair and open conditions
competition between CATV and broadcasting stations .
[and] to ameliorate the adverse impact of CATV c
petition upon local stations," the Commission adopted r
requiring microwave CATV systems to carry the sig
of local television broadcasters and imposed "reasona
carriage and non-duplication requirements." Ibid. at 3
714.

The next step was the adoption of the *Second Report*
Order on March 4, 1966, 2 F.C.C. 2d 725 (1966).[2] The C

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[1] 1 F.C.C. 2d 453 (1965). There was attached to the document a "
mission's Memorandum On Its Jurisdiction and Authority", which
cluded that ". . . the Commission presently has jurisdiction over all C
systems, whether microwave is used or not." Ibid. at 478-482. This m
randum was also appended to the Second Report and Order.

[2] The Second Report and Order was modified in minor respects by M
randum Opinions and Orders adopted on April 20, 1966, 3 F.C.C. 2d
(1966), and January 5, 1967, FCC 67-34.

mission modified its earlier issued rules and made them applicable to all CATV systems—whether microwave or non-microwave.

In essence, the *Second Report and Order* and the rules adopted therein regulate and limit the operation of CATV systems in three major respects. First, the "Compulsory Carriage" rules provide that CATV systems are required to carry the signals of local and nearby television stations if requested. Second, the "Exclusivity" rules provide that a television station with a stronger signal over the CATV community may prevent the system from carrying on the same day those programs of another station with a weaker signal which duplicate its programs.[3] Third, the "Top 100 Market" rules provide that in the markets so designated CATV systems may not, without Commission authorization, carry the signals of television broadcast stations unless such stations place a signal of Grade B strength over the community serviced by the CATV system.[4]

The foregoing history spells out the sharp change between 1959 and 1965 in the Commission's view of its authority to regulate CATV. It should, however, be pointed out that during that period the Commission

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[3] The Commission rules governing television broadcast stations recognize three grades of signal strength—Principal City Grade, Grade A and Grade B. These grades are defined in terms of the level of signal intensity which is required to provide an acceptable signal to 90% of the locations for the following percentages of time: Principal City Grade—90%; Grade A—70%; Grade B—50%.

[4] Section 74.1101, et seq. of the Commission's Regulations. 47 C.F.R. § 74.1101, *et seq.* (1967).

repeatedly sought, but Congress did not enact, authorizing legislation dealing specifically with CATV.[5]

E. The Proceedings Here Involved

Petitioner is the operator of a community antenna tele vision system (hereinafter CATV)[6] in Port Angeles Washington. (R. 0001). Petitioner's CATV system com menced operations in May of 1960. (R. 21). At that time the Commission had not attempted to exercise jurisdiction over CATV systems and had actually refused to regulate them. (R. 21). In the year before Petitioner began the operation of its CATV system, the Commission had decided unanimously that it did not possess jurisdiction to regulate CATV systems directly. (R. 21 and 22). It stated a reason for its decision (refusing to regulate CATV

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[5] The history of these attempts is set out in a footnote contained in th Notice of Inquiry and Notice of Proposed Rule Making, *supra*, note 1, a **464, n. 13:**

> Following the Report and Order in Docket No. 12443, supra, the Com mission recommended that the Congress amend the Communications Ac to require CATV systems to obtain the consent of the stations whos signals they transmit, and to carry the signal of the local station (with out degradation) upon request. These proposals were embodied i S. 1801 and H.R. 6748, introduced in the 86th Congress, including S 2653 (providing for the licensing of CATV systems) and S. 2303 (pro viding for the issuance of certificates of convenience and necessity). Th Communications Subcommittee of the Senate Committee on Interstate an Foreign Commerce reported favorably on S. 2653. S. Rept. 923, 86t Cong., 1st Sess. In 1960, following two days of debate on the floor o the Senate (106 Cong. Rec. 10326, 10344, 10407 and 10520), S. 2653 wa recommitted to the Committee on Interstate and Foreign Commerce b one vote, 106 Cong. Rec. 10547. As a result, no legislation relating t CATV systems was enacted in the 86th Congress. In the 87th Congres the Commission proposed S. 1044 and H.R. 6840, which would hav expressly authorized the Commission to issue rules for the protection o stations providing locally-originated television programs. These bil received no action. The Commission proposed no legislation to the 88t Congress, and no action was taken on any bills.

[6] The operation of CATV systems has been described in detail in *Clark burg Publishing Co.* v. *Federal Communications Commission*, 225 F. 2d 5 (D.C. Cir. 1955) and *Lilly* v. *United States*, 238 F. 2d 586 (4th Cir. 1956).

systems) which is still valid today. The Commission stated:

> "59. We have no doubt that, as the broadcasters urge, CATV's are related to interstate transmission (regardless of where the station retransmitter is located, the signal often originates, via network, in New York or elsewhere). Therefore it appeared to us there is no question as to the power of Congress to regulate CATV's, or give the Commission jurisdiction to do so, if it desires. But, as an administrative agency created by Congress, we are of course limited by the terms of the organic statute under which we were created, and must look to that statute to find the extent of our jurisdiction and authority."[7] (R. 22).

The Commission from 1960 to this day recommended several bills to the Congress which would have given the authority to the Commission to regulate CATV systems and accompanied the request for submission of these bills with the statement that the Commission needed this authority, but the bills have not been enacted into law. (R. 22).

Under the jurisdictional posture of the Commission prevailing in 1960, Petitioner obtained a local franchise to provide CATV service to Clallam County, Washington. Petitioner is currently providing such service to the viewers of the community of Port Angeles, Washington, and its surrounding suburbs. (R. 0001 and R. 22). The population of Clallam County is approximately 35,000. Port Angeles has a population of approximately 15,000. Petitioner's CATV system serves about 3,000 subscribers.[8] (R. 0001, 0002, R. 22 and 23).

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[7] In the Matter of Inquiry into the Impact of Community Antenna Systems, etc. on the Orderly Development of Television Broadcasting, Docket No. 12443, Report and Order No. FCC 59-292, 24 Fed. Reg. 30004, 18 Pike & Fischer Radio Reg. 1573 (1959); 26 FCC 403 Par. 59. See also, Pars. 62, 64, 69 and 70 of the same document.

[8] FCC Memorandum Opinion and Order in this matter, released January 23, 1968, page 1, para. 1. (R. 0015).

The Port Angeles Telecable, Inc. CATV system supplies its subscribers with the signals of the following television stations:

Call Sign	Channel	Network	Location
CBUT-TV	2	CBS	Vancouver, British Columbia
KOMO-TV	4	ABC	Seattle, Washington
KING-TV	5	NBC	Seattle, Washington
CHEK-TV	6	CBS	Victoria, British Columbia
KIRO-TV	7	CBS	Seattle, Washington
CHAN-TV	8	CTV	Vancouver, British Columbia
KCTS-TV	9	Educational	Seattle, Washington
KVOS-TV	12	CBS	Bellingham, Washington (R. 0002 & R. 23)

The city of Port Angeles is located on the Straits of Juan de Fuca which is 17 miles south of Victoria, British Columbia. This community is on the Olympic Peninsula surrounded on the north and northeast by water (Straits of Juan de Fuca), and on the south and west by the Olympic Mountain Range which severely impedes the reception of television signals from all United States stations except Station KVOS, Bellingham, Washington. This is because Bellingham, which is a greater distance from Port Angeles than Seattle (R. 0002, R. 23) transmits its signal over the Straits of Juan de Fuca to said community. "Spotty" television reception caused Petitioner to select an antenna site so as to insure that its subscribers receive high quality reception from all television channels available in the Port Angeles area, especially the Seattle stations. (R. 0003 and R. 23).

In the Spring of 1966, six years after Petitioner's CATV system began operations in Port Angeles, the FCC assumed regulatory jurisdiction over the entire CATV industry and published certain Rules and Regulations in the Federal Register which it adopted as the *Second Report and Order*.[9] The *Second Report and Order* was adopted by the Commission after voluminous comments were filed by both representatives of the broadcasting industry and the

[9] 2 FCC 2d 725 (1966).

CATV industry during the pendency of the rulemaking proceeding. (R. 24).

Port Angeles Telecable, Inc. is a member of the National Cable Television Association, Inc. (formerly called National Community Television Association, Inc.), of Washington, D. C. The National Cable Television Association, Inc. (hereinafter NCTA), the only national trade association for CATV members and associate members, filed voluminous comments on behalf of its members, including Petitioner, in the aforesaid rulemaking proceeding. These comments challenged the jurisdiction of the Commission to regulate CATV systems, because neither the Communications Act of 1934, as amended, nor any other law grants to it such authority either expressly or impliedly, and NCTA challenged the proposed regulations as arbitrary and capricious and as violative *inter alia* of the due process clause of the Fifth Amendment to the Constitution of the United States. Nevertheless, the Commission adhered to its said Rules and Regulations. These legal challenges are now pending in cases in the Circuit Court of (R. 24) Appeals for the Eighth Circuit [10] and some of the issues are being reviewed in the Supreme Court of the United States on certiorari from a decision of this Court.[11] (R. 25).

Pursuant to the said *Second Report and Order,* Television Station KVOS-TV, Bellingham, Washington, has requested non-duplication protection under Section 74.1103 (e) of the Commission's Rules.[12] On September 14, 1966,

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[10] *Black Hills Video Corporation and Midwest Video Corporation, Petitioners* v. *United States of America and Federal Communications Commission* (Case No. 18,052).

[11] *Southwestern Cable Co., et al.* v. *United States of America and Federal Communications Commission* (378 F. 2d 118—C.A. 9, 1967).

[12] 47 C.F.R. § 74.1103; *United States of America and Federal Communications Commission* v. *Southwestern Cable Co., et al.* (Case No. 363), on certiorari to the Supreme Court of the United States (Oct. Term 1968).

Petitioner, through its CATV system manager, Mr. Jack B. Chapman filed a Petition For Waiver with the Commission dated September 7, 1966, pursuant to Section 74.1109 of said Rules. (R. 0001-0008, R. 25).

After outlining the facts and statistics pertaining to Petitioner's operation, as narrated above, the said Petition For Waiver stated that compliance with the request by KVOS-TV would require the Petitioner to delete at least substantial portions of the programming of Television Station KIRO-TV, Seattle, Washington, and would possibly result in totally deleting the programs of this Seattle station from its system. (R. 0003 and R. 25).

Petitioner pointed out that a grant by the Commission of its Petition For Waiver would not adversely affect Television Station KVOS-TV. (R. 0005). In support of this conclusion, Petitioner stressed the following facts.

The contours of Station KVOS in Bellingham are very unique and provide said licensee with the best of both possible worlds. This station (R. 0004 and R. 25) provides a Grade A signal to Vancouver, British Columbia; Victoria, British Columbia; and its Grade A signal falls just north of Seattle. Seattle, is, however, within its Grade B contour. Its non-network advertisements and non-network programming, for the most part, cater to advertisers and listeners within its Canadian coverage. Geographical factors are such that it has an extremely choice coverage contour, which should not prejudice the subscribers of the Port Angeles CATV system who enjoy, desire and are dependent upon the signals from the Seattle stations, especially KIRO-TV. (R. 0004 and R. 26).

Petitioner stated KVOS would not be prejudiced against should the Commission grant the waiver request. (R. 0005 and R. 26).

KVOS-TV serves both Vancouver, British Columbia and Bellingham, Washington. This is understandable; KVOS serves a potential of 368,200 television households in

British Columbia and only 145,700 such households in the United States. The Canadian Bureau of Broadcast Management credits KVOS-TV with a "station reach" of 268,100 homes, whereas the American Research Bureau credits KVOS-TV with an average daily circulation of 34,500 homes in the United States. The network base hourly rate of KVOS-TV is only $300.00, whereas its Class AA rate is $650.00, which is obviously attributable to KVOS-TV's substantial Canadian audience. All of this information is recited in the 1966 edition of *Television Factbook*. (R. 0005 and R. 26).

Petitioner brought to the attention of the Commission the fact that the community of Port Angeles is a Seattle suburb and not a Bellingham suburb. Port Angeles is 63 miles from Bellingham and only 60 miles from Seattle. However, to travel from Port Angeles to Bellingham encompasses a trip of approximately 170 miles. An individual traveling by automobile from Port Angeles must cross one toll bridge (R. 0003 and R. 27), take a ferry across a body of water and drive 94 miles to reach Bellingham. This trip consumes approximately 3½ hours. A trip from Port Angeles to Seattle takes only about two hours. The proximity of Seattle to Port Angeles has caused the citizens therein to become dependent upon Seattle in all regards. Seattle advertisers cater to the Port Angeles market; such is not the case as concerns retailers in the Bellingham area. A cursory glance at any map reveals the closer geographical proximity of Seattle *vis-a-vis* Bellingham to Port Angeles. (R. 0004 and R. 27).

The Petition For Waiver pointed out the inconsistencies in the Commission's Rules if they were applied to the prevailing situation in Port Angeles. The Rules would work to the benefit of three Canadian television stations (CBUT, CHEK and CHAN) (R. 0005 and R. 27), which could advertise on their channel and be heard and seen by the subscribers of the CATV system, but KIRO-TV and KING-TV, of Seattle, Washington, would be blacked out when

KVOS-TV would use the same programs as KIRO and KING within a twenty-four hour period, and the advertisements from Seattle could not then reach Petitioner's CATV subscribers. (R. 0005, 0006 and R. 27).

Petitioner did not ask for relief only for its subscribers, but it pointed out that the Rules were detrimental to the community of Port Angeles. (R. 0006 and R. 28). This was obvious from the fact that merchants in Seattle, which is much more readily accessible to the inhabitants of Port Angeles than Bellingham (R. 0003, 0004), cannot advertise their goods in Port Angeles, because certain programs containing these advertisements are blacked out by Commission fiat, while the Bellingham station's programs and advertising, which cater more to the Canadian markets, can be shown on the Port Angeles CATV system. Thus, the citizens of Port Angeles are deprived of the benefit of advertisements originating from Seattle. (R. 28).

The Commission summarily denied Petitioner's Petition For Waiver on January 23, 1968 (R. 0015-R. 0018). Petitioner duly filed before this Court a Petition For Review as stated in the Jurisdictional Statement, *supra*.

F. Questions Presented

The questions presented which will be argued in detail in this Brief are as follows:

1. Does the Federal Communications Commission have statutory authority to issue rules, regulations and orders with respect to CATV systems which are not served by microwave and which, accordingly, make no use of the radio spectrum?

2. If the Commission does possess such authority, can it deprive the viewing public of its right to select the television programs of its choice through general rules adopted upon the mere conjecture and without proof that a CATV system will have an adverse

economic impact upon television stations to the extent that the public interest will be adversely affected?

3. Can the Commission deny a Petition For Waiver of its non-duplication rules based upon allegations supported by affidavit of Petitioner without a hearing, when the allegations are simply contradicted by an Opposition not accompanied by an affidavit as required by the Commission's Rules?

4. Can the Commission apply its rules to a pre-existing CATV system, which has relied upon the Commission's repeated declarations that it had no jurisdiction over it, in a way that changes its business practices and threatens its continued existence?

5. Can the Commission's rules arbitrarily discriminate between CATV subscribers and the general public in prohibiting the CATV subscribers only from viewing certain television programs available to all in the CATV community?

6. Can the Commission's rules prohibit advertising from distant stations to be received in the CATV community without violating the antitrust laws?

7. Can the Commission impose upon a non-licensee CATV operator the restrictions imposed upon its licensees while simultaneously denying to the CATV operator the procedural protections of Section 309(e) of the Communications Act because he is a non-licensee?

. Specification of Errors

1. The Commission's attempt to regulate Petitioner, a ATV system not served by microwave, was issued with-ut statutory authority.

2. The Commission summarily disposed of Petitioner's rguments claiming that its contentions were "largely con-

clusionary in nature."[13] (R. 0015, para 2, and R. 28) To the contrary, Petitioner's CATV system manager, Mr Jack B. Chapman, accompanied the pleading with an affidavit to the effect that he had "reviewed the foregoing petition for waiver and states that the facts therein othe than those which may be officially noticed, are based upon his personal knowledge and are true and correct." (R. 0007 and R. 28). The Commission in its Memorandum Opinion and Order does not point to contrary statements under oath or to facts which contradict the claims in Mr Chapman's affidavit. (R. 0015-R. 0017). As stated to the Federal Commmnications Commission by the United States Circuit Court for the First Circuit in the case of *Presque Isle TV Co., Inc. et al.* v. *United States of America and Federal Communications Commission* (Case No. 6896 (R. 28), in a decision rendered on December 18, 1967 "there was no justifiable basis for the Commission sweeping them aside with a part of one sentence." (R. 29 (*Presque Isle TV Co., Inc. et al.* v. *United States of America and F.C.C.*, ...F.2d ..., 1st Cir. 1967).

In that case, the Petitioner had filed affidavits with reference to the signal strength of television stations and pertaining to economic impact and the Commission had simply stated, in effect, as in this case, that it was not convinced, despite the fact the testimony was uncontradicted. In the instant case, likewise, KVOS did not show how or to what extent it would be injured financially by Petitioner's carrying the Seattle stations' programs. (R. 2 R. 0009-0013).

The Rules of the Federal Communications Commissio (§ 74.1109) provide that comments or opposition (such as that filed by Intervenor, KVOS Television Corporatio R. 0009-R. 0014) to a petition (such as that filed by Pe

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13 Memorandum Opinion and Order released January 23, 1968, page 1, pa 2 (R. 0015).

tioner (R. 0001-R. 0008) before that Commission "shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon". The Commission's Rule § 74.1109(c)(2)(d) states:

> Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon." [14]

Intervenor's, KVOS's, opposition did not contain the required detailed full showing and it was not supported by an affidavit,[14] although Petitioner's Petition For Waiver filed with the Commission was supported by the affidavit (R. 0007) required by the Commission's Rules (§ 74.1109 (c)(1).[15]

Still this did not phase the Commission nor deter it from disregarding the facts and considerations contained in Petitioner's Petition For Waiver and making a finding based upon allegations made by Intervenor in its Opposition To Petition For Waiver. The Commission disregarded the facts and allegations supported by Petitioner's affidavit and based its findings upon Intervenor's allegations and conclusions which were not supported by affidavit as required by the Commission's Rules. This does not constitute a finding by the Commission upon the facts in the record.

In fact, the Commission's decision appears to be merely a synthesis of the Intervenor's Opposition To Petition For

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[14] The nearest attempt to supporting its allegations was made by KVOS by incorporating by reference irrelevant affidavits filed in an entirely different case not involving Petitioner (R. 0011 and R. 0012). This fails to comply with § 74.1109(c)(2), *supra*.

[15] 47 C.F.R. § 74.1109, *et seq.* (1967).

Waiver. The Memorandum Opinion and Order of the Commission simply paraphrases Intervenor's uncorroborated Opposition. The following comparison of the salient points in the Commission's Memorandum Opinion and Order with the main points in Intervenor's Opposition makes this conclusion inevitable.

KVOS' Opposition to Petition for Waiver (R. 0009-0014) (Emphasis added)	*FCC's Memorandum Opinion and Order* (R. 0015-0018) (Emphasis added)
1. So far as the public is concerned, it is immaterial whether the network programs it views are those of KIRO-TV or KVOS-TV (R. 0010).	It makes no real difference to the cable subscribers whether they watch CBS programming on the channel allocated to KVOS rather than on the one alloted to KIRO. (R. 0015 and 0016).
2. In support of its request to be relieved of the requirement that it afford non-duplication protection to KVOS, Port Angeles Telecable agrees that (a) the community of Port Angeles is more closely identified with Seattle than with Bellingham; (b) KVOS-TV has unique advantages; and (c) KVOS-TV would not be prejudiced should the Commission grant Port Angeles Telecable's waiver request.	In support of its waiver request, Port Angeles Telecable argues that Port Angeles has a greater community of interest with Seattle than with Bellingham; that KVOS-TV would not be prejudiced by a grant of the waiver. *These contentions are largely conclusionary in nature.* No facts are alleged in support of the claims that the people of Port Angeles are "dependent upon Seattle in all regards" and that "Seattle advertisers cater to the Port Angeles market" while Seattle retailers do not. *But even* if true, these arguments are not persuasive (R. 0015, para. 2).
3. Not only has Port Angeles Telecable failed to provide factual support for those claims, but *it has totally failed to show that such considerations, even if true, would warrant a departure from the Commission's non-duplication requirements as*	Our *Second Report and Order* in Docket Nos. 14895 et al., 2 FCC 2d 725, found, for reasons there stated, that stations in this situation are entitled to limited protection of the program exclusivity for which they have bargained through the deletion of more distant programs

KOS' Opposition to Petition for Waiver (R. 0009-0014) (Emphasis added)

et forth in Rule 74.1103 (R. 010). . . . There is no under- ying factual support for Port ngeles Telecable's *conclu- ionary statements.* (R. 0011).

4. Port Angeles Telecable makes point of the fact that VOS-TV provides television ervice to persons in Canada s well as to the United States itizens whom it is licensed to erve. The short answer to his contention is that KVOS- V is a fully American sta- ion which fully meets its re- ponsibilities to serve the eeds and interests of the Jnited States viewing public ithin its service area. (R. 011). . . . Port Angeles Tele- able's final argument in sup- ort of its waiver request is hat KVOS-TV would not be rejudiced by a grant of its etition. *Port Angeles Tele- able's suggestion that KVOS- V has sufficient coverage so hat incursion into its United tates revenues can be over- ooked must be rejected. Port ngeles Telecable's own peti- ion concedes that a substan- ial portion of KVOS-TV's evenue is derived from net- ork sources, which conced- dly are rated on the basis of irculation in the United tates.* (R. 0012).

FCC's Memorandum Opinion and Order (R. 0015-0018) (Emphasis added)

duplicating their own. It would be disruptive of KVOS-TV's audience in Port Angeles for its network programming to continue to permit that programming to be duplicated from Seattle. Our *Second Report* explains the reasons for requiring program exclusivity and Telecable has not shown that these reasons are not fully applicable here.

Finally, the claim that KVOS would not be prejudiced is, again, not adequately supported. While it is suggested that it derives substantial revenues from its Canadian circulation, it is conceded that it has a network base hourly rate of $300, which depends upon its audience for the network programs here in question. Port Angeles is within its Grade A contour, and it is the only American station which provides dependable over-the-air service to that community. (R. 0016).

3. The Commission's Rules pertaining to waiver appl tions provide that "The petition may be submitted formally, by letter . . . ." (§ 74.1109(b)), [see Appe A attached to this Brief] and that the Commission, a the consideration of the pleadings, may determine whe the public interest would be served by the grant, in wl or in part, or denial of the request, or may issue a ru on the complaint or dispute. The Commission may spe other procedures, such as oral argument, evidentiary h ing, or further written submissions directed to partic aspects, as it deems appropriate (§ 74.1109(f)). [Appendix A attached to this Brief.]

If the Commission did not believe that Mr. Chapm affidavit was conclusive, it could have held oral argum ordered a hearing or at least it could have ordered furt written submissions in the case. (R. 29). Instead, it tur down the request for waiver summarily and arbitra (R. 30 and R. 0015-R. 0017).

In fact, the Commission's Memorandum Opinion Order in this case indicates that the Commission already made up its mind and that no matter how suasive Petitioner's proof was, the outcome would h been the same. The Commission said: "But even if t these arguments are not persuasive."[16] This conclu defies logic. If Petitioner's statements supported affidavit are true and correct to the effect that Port Ang has a greater community of interest with Seattle than Bellingham (R. 0003, 0004), that KVOS-TV obtains revenue primarily from its Canadian audience (R. 0 0005) and that *KVOS-TV would not be prejudiced* b grant of the waiver (R. 0005), then there would be no pu interest involved in protecting KVOS-TV from competi with the Seattle television stations and depriving CA subscribers from the programs and advertising of

[16] Memorandum Opinion and Order released January 23, 1968, pa (R. 0015).

Seattle television stations. The Commission confesses its arbitrariness and capriciousness in this statement. (R. 30).

The Commission's non-duplication rules are on their face a protectionist policy for television stations regardless of need. The proof is that they go into effect in any particular case and in all cases only if the television station requests the protection in writing from the CATV system. These Rules were adopted in spite of the policy of the Communications Act which allows television stations to be involved in the competitive free enterprise system without being subjected to public utility, common carrier and profit limiting rules such as pertain to telephone common carriers, for instance. The non-duplication rules apply regardless of a showing of need by the television station. Thus the public is deprived of information and advertising messages because of these arbitrary and capricious rules of the Commission, contrary to the First Amendment to the Constitution of the United States. (R. 30 and 31).

The Commission stated:

> "It makes no real difference to the cable subscribers whether they watch CBS programming on the channel alloted to KIRO." [17]

The Commission has evidence in its files that CATV subscribers often react violently to having a television channel to which they are accustomed yanked away from them by Commission action. For example, one CATV system, in a case brought to the Commission's attention, lost 300 subscribers within the very first month by complying with the Commission's Rules.[18] When the Seattle stations are blacked out by the Commission's action, the particular channels remain dark instead of containing a station's

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[17] Memorandum Opinion and Order released January 23, 1968, pp. 1 and 2 (R. 0015 and 0016).

[18] The Black Hills Video Corporation and Midwest Video case referred to in n. 10, *supra*.

program. This is a deprivation of a service for which he CATV subscriber pays a monthly fee. Part of the consideration for the monthly fee is to light up as many channels or television signals as can be received in the locality by means of the coaxial cable. Insistence by the Commission upon imposing these arbitrary and capricious Rules probably will cause Petitioner to lose many subscribers and thus be deprived of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. Furthermore, the Commission's Rules, if upheld, would require Petitioner to spend several thousands of dollars in obtaining additional personnel in order to switch the programs off and back out the channels or to purchase an expensive time-clock which is designed to do this automatically, or to do both of these things. Furthermore, time-clocks are not reliable and they can involve Petitioner unwillingly and unwittingly in violation of the Rules and subject it to punishment by the FCC. (R. 31 and 32).

The Commission knows that its following statement is inaccurate:

> "It makes no real difference to the cable subscribers whether they watch CBS programming on the channel allocated to KVOS rather than on the one allotted to KIRO, and the former's signal should be the stronger one in the Port Angeles area." [19]

Were non-duplication pursuant to the Commission's Rules put into effect, the channels on which the duplicating Seattle stations occur would be blacked out while KVOS broadcast the same programs and the same programs cannot be broadcast for a twenty-four hour period. The CATV subscriber while watching a program is suddenly faced with an exasperating blacked out screen and

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[19] Memorandum Opinion and Order released January 23, 1968, pages 1 and 2 (R. 0015 & 0016).

he must get up and change it to another channel. (R. 32). In the case of shut-ins or sick or crippled people, this can cause a very serious disruption. Furthermore, the programs may be lost to the particular viewers, if a movie, for instance, is shown at a particular time on a particular day by KVOS-TV and because of the FCC Rules it cannot be received that day on a Seattle television station at another time on the same day, when the particular viewers have the time or the opportunity to see it. All of this was explained at length to the FCC by NCTA in the proceedings which led to the issuance of the *Second Report and Order.* This is a glaring instance where a Government agency purports to know more than the particular business operator whether it makes a real difference to the clientele to be deprived of a program at a particular time. (R. 33).

5. The Commission made the assumption that KVOS's signal "should be the stronger one in the Port Angeles area."[20] That is a pure assumption, not based upon any fact in the record. The Commission should know that a CATV system usually obtains its signal on a tower on a high mountain-top where the mountains would not interfere with reception as they do in the valleys. Port Angeles' pleading stated that Bellingham is a greater distance from Port Angeles than Seattle. (R. 33).

6. The Commission's finding that "it would be disruptive of KVOS-TV's audience in Port Angeles for its network programming to continue to permit that programming to be duplicated from Seattle[21] is not based upon any substantial evidence in this record or in the proceedings which led to the *Second Report and Order,* as NCTA for Petitioner and others pointed out in the latter proceedings. KVOS has not shown that its programming is or will be disrupted

[20] Memorandum Opinion and Order released January 23, 1968, page 2 (R. 0016).

[21] Memorandum Opinion and Order released January 23, 1968, page 2 (R. 0016).

by Petitioner's CATV continuing to do what it has done for years, viz., to receive the programs from the Seattle stations. (R. 33 & 34).

KVOS-TV in its Opposition To Petition For Waiver (R. 0009-R. 0014) filed by Port Angeles did not deny that it had a choice television allocation because of its proximity to the Canadian markets which it serves. The Commission's annually published statistics for the last five years indicate that the average commercial television station in the United States makes unprecedented profits, by comparison with other businesses. Those statistics prove that the average commercial broadcast station currently makes between 100% and 105% return on its capital investment each year before taxes and depreciation. Under the circumstances, it is unreasonable, arbitrary and capricious for the Commission to issue a rule which requires protection by a CATV system of a television station without proof of the need of such protection on the part of the broadcast station requesting protection, through an enforced black out of the programs of competing television stations in other markets. The *Second Report and Order* of the Commission states that the television station is entitled to such protection without proof or even allegation of need. The public is made the loser in this type of arbitrary and capricious Rule and the private businessman who operates a CATV system. (R. 34).

H. Summary of Argument

The regulations adopted by the Commission in its *Second Report and Order* deal in considerable detail with a wide variety of subjects such as whether a CATV system has the right to carry only the signals of its choice or whether it must carry the signals of local television stations.

This issue is not present here because Petitioner voluntarily carries the signals of so-called local television stations, including that of KVOS-TV, the Intervenor herein.

The simple aspect of the Commission's Rules involved in this case is whether the Commission has the right to compel arbitrarily a CATV operator to black out to his financial detriment from his subscribers' view the signals of television stations which they can see anyway on their television sets by means of a roof-top antenna.

Because this question is inextricably interwined with the question of Commission jurisdiction to regulate those CATV operators, such as Petitioner, who make no use of the radio spectrum, this latter question will be argued first.

There is nothing in the Federal Communications Act of 1934 which gives to the Commission authority to regulate a business which makes no use of the radio spectrum, except a common carrier by wire engaged in interstate commerce. A CATV system makes no use of the radio spectrum, and the Commission itself and the Courts have ruled that a CATV system is not a common carrier. Therefore, a CATV system, such as Petitioner, which is not served by microwave, is not subject to the Commission's jurisdiction. The Commission repeatedly has asked the Congress for this power and the Congress did not grant its request.

Even if it were conceded, *arguendo,* that the Commission did have jurisdiction over Petitioner, the Commission does not have the authority to deprive the viewing public of its right to select the television programs of its choice through general rules adopted upon the mere conjecture and without proof that a CATV system will have an adverse economic impact upon television stations to the extent that the public interest will be adversely affected.

Again, if it were conceded, *arguendo,* that the Commission could regulate CATV systems, the Commission cannot apply its regulations to a CATV system which was in existence before the Commission asserted its jurisdiction in a way which causes the CATV system to lose subscribers or

which threatens its continued existence. This is a deprivation of property without due process of law.

Even if the Commission did have jurisdiction over CATV systems, it cannot arbitrarily discriminate between CATV subscribers and the general public by prohibiting the CATV subscribers only from viewing certain television programs available to all in the CATV community.

The Commission cannot without violating its own precedents and the antitrust laws of the United States prohibit advertising from distant television stations from being received in the community by CATV subscribers only.

The Commission cannot impose upon a non-licensee, such as Petitioner, the restrictions imposed upon its licensees while simultaneously denying to the CATV operator the procedural protections afforded to licensees under the Communications Act of 1934 because he is a non-licensee.

ARGUMENT

I. THE COMMUNICATIONS ACT OF 1934 CONFERS NO AUTHORITY ON THE COMMISSION TO REGULATE NON-MICROWAVE CATV SYSTEMS

The Commission rested its Memorandum Opinion and Order in this case squarely upon its *Second Report and Order* in Docket Nos. 14895, et al., 2 FCC 2d 725 (R. 0016). The Commission stated: "Our *Second Report* explains the reasons for requiring program exclusivity and Telecable has not shown that these reasons are not fully applicable here." (R. 0016). The Commission does not base its decision upon any other grounds.

The *Second Report and Order* (2 FCC 2d 725 [1966]) was based upon the following alleged authority contained in the conclusion of that Report and Order:

> *Conclusion*
>
> 154. Authority for adoption of these rules is contained in Sections 1, 4(i), 303, 307(b), 308, and 309 of the

> Communications Act. We wish to stress particularly the provisions of Section 1 that the general purpose of the Act is to "maintain the control of the United States over all the channels of interstate and foreign radio transmission . . . under licenses granted by federal authority"; of Section 303(h), "to establish areas or zones to be served by any station"; of Section 307(b), to make "a fair, efficient, and equitable distribution of radio service among the several states and communities", Section 303(g), to study new uses of radio and generally encourage the larger and more effective use of radio in the public interest, and Section 303(s), the "all-channel receiver" section. The rules we adopt here, under the rule making power bestowed upon the Commission in Sections 4(i) and 303(r), are designed to "study new uses" and insure future CATV activity and growth consistent with the "larger and more effective use of radio in the public interest". Indeed, the type of situation here involved is the very reason for the creation of this agency as the history of early chaos in the radio field shows. As the Supreme Court has stated, the Communications Act "expresses a desire on the part of Congress to maintain, through appropriate administrative control a grip on the dynamic aspects of radio transmission" (*FCC* v. *Pottsville* Bctg. Co., 309 U.S. 134, 138; see also *NBC* v. *U. S.*, 319 U.S. 190).

The Commission is composed of seven members and three of the members dissented to all or certain parts of the *Second Report and Order.*

Commissioner Bartley's dissent is as follows:

> I dissent from the action asserting jurisdiction over community antenna systems. In my opinion, the Communications Act does not now confer such jurisdiction and the Commission is without authority to promulgate these rules.
>
> I believe that we should seek legislation to resolve the basic considerations in this matter. Since the real concern surrounding CATV appears to be its possible evolution into pay TV, I propose an amendment of the Communications Act to preclude community

> antenna systems from distributing programs other than those received from transmissions of broadcast stations.
>
> I am opposed to the rule's impediments on entry of community antenna systems into the top 100 markets, and specification of the Grade B contour, rather than the Grade A or lesser contour, as the benchmark for requiring carriage of local TV stations. (Attached to *Second Report and Order*).

Commissioner Loevinger concurred in the substantive provisions of the Order but said:

> "I cannot join in the opinion or agree that the Commission has the jurisdiction which it now asserts." . . .
>
> On the other hand, the assertion of jurisdiction is a legal matter that requires a legal judgment. Nothing has appeared or occurred since the previous Commission statement on this subject that furnishes any basis for reaching a different conclusion as to jurisdiction than the one set forth in my prior opinion. 38 FCC 683, 746 (1965). Accordingly, I adhere to that opinion and to the conclusions stated there." (Attached to *Second Report and Order*).

Commissioner Loevinger is a former judge of the Supreme Court of Minnesota. Because of the lucidity of his views in the devastating attack which he made upon the alleged jurisdiction of the Commission, his dissenting opinion attached to the First Report and Order of the Commission (30 F.R. 6038; 38 FCC 683, 746 (1965), and incorporated by reference in his dissent to the *Second Report and Order* (31 F.R. 4540; 2 FCC 2d 725 [1966]) is carried in full in Appendix B to this brief.

Petitioner is a member of the National Cable Television Association, Inc., (hereinafter NCTA) of Washington, D. C., which is the only national trade association for CATV systems in the United States. All of the legal arguments contained in this brief were made in substance

by NCTA on behalf of its members in the proceedings before the Commission which led to the issuance of the *First Report and Order* and the *Second Report and Order* in Docket Nos. 14895, 15233 and 15971. These legal challenges are now pending in cases in the Circuit Court of Appeals for the Eighth Circuit[22] and some of the issues are being reviewed in the Supreme Court of the United States on certiorari from a decision of this Court.[23] (R. 24, 25, 33). The case was argued before the Supreme Court of the United States on March 12 of this year and a decision is expected before the end of the Supreme Court's present term in June of this year.

The alleged basis of the Commission's jurisdiction to regulate non-microwave CATV systems is contained in the Conclusion of the *Second Report and Order, supra.* Succinctly stated, as it is generally in the Government's briefs before the Courts and such as in the *Southwestern Cable Company* case now pending before the Supreme Court of the United States, it amounts to the following:

> "CATV constitutes interstate communication by wire (47 U.S.C. 152(a), 153(c) since the systems physically intercept and extend television signals. By so doing, they directly affect and threaten to disrupt the allocation plan for off-the-air television service established by the Commission under the Act (47 U.S.C. 303(h) and (s), 307(b). CATV is therefore subject to the Commission's general regulatory powers (47 U.S.C. 154(i), 303(f) and (r), 312(b))."

This argument is wholly dependent upon the assumption that CATV constitutes "interstate communication by wire"

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22 *Black Hills Video Corporation and Midwest Video Corporation, Petitioners* v. *United States of America and Federal Communications Commission* (Case No. 18,052).

23 *Southwestern Cable Co., et al.* v. *United States of America and Federal Communications Commission* (378 F. 2d 118—C.A. 9, 1967); *United States of America and Federal Communications Commission* v. *Southwestern Cable Co., et al.* (Case No. 363. October Term, 1967) on certiorari to the Supreme Court of the United States.

and therefore falls under the authority vested in the Commission. The argument refers to the fact that Sections 303(h) and 307(b) of the Act, 47 U.S.C. §§ 303(h), 307(b) (1964), empower the Commission "to establish areas or zones to be served by" radio stations and to provide for a "fair, efficient, and equitable" distribution of radio services "among the several States and communities." It notes that Section 303(s)[24] was enacted to effectuate the policy of encouraging local broadcasting by authorizing the Commission to require television receivers shipped in interstate commerce be equipped to receive UHF transmission. Finally, it refers to Sections 4(i), 303(f) and 303(r), 47 U.S.C. §§ 154(i), 303(f), 303(r) (1964), general provisions conferring authority upon the Commission to perform acts, make rules and regulations, prescribe restrictions and conditions and issue orders.

The Commission's assertion of jurisdiction over CATV, based on claimed authority over "interstate communication by wire" explicitly disavows reliance on the Commission's authority to regulate common carriers under Title II of the Act. On the contrary, the Commission has expressly rejected the view that CATV systems are common carriers. *Frontier Broadcasting Co.* v. *Collier,* 24 F.C.C. 251 (1958); *Philadelphia Television Broadcasting Co.* v. *FCC,* 359 F.2d 282 (D.C. Cir. 1966). It also ruled that CATV is not engaged in broadcasting and that, therefore, its activities do not constitute unauthorized rebroadcasts in violation of Section 325(a) of the Act, 47 U.S.C. § 325(a) (1964). (*Frontier Broadcasting* case, *supra*).

Nor does the Government contend that CATV constitutes "radio communication." The suggestion was considered and rejected by the Commission when it originally decided it had no authority to regulate CATV. *CATV and TV*

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[24] 47 U.S.C. § 303(s) (1964). This is the so-called All-Channel Receiver Law. Pub. L. No. 87-29, 76 Stat. 150 (1962).

Repeater Services, 26 F.C.C. 403, 428-29 (1959). It was again discussed in the Commission's Memorandum On Its Jurisdiction and Authority, 1 F.C.C.2d 453, 478-82, issued on April 23, 1965, as an attachment to the *Notice of Inquiry and Notice of Proposed Rule Making* which initiated the *Second Report and Order.* However, when the Commission issued the *Second Report and Order* on March 4, 1966, almost one year later, it relied for its claim to jurisdiction solely on its view that CATV constitutes communication by wire. In these circumstances the contention that CATV also constitutes communication by radio cannot be considered here. *SEC* v. *Chenery Corp.,* 318 U.S. 80, 87 (1943).[25]

. History and Structure of the Communications Act in 1934

Prior to 1934 the authority over radio communications now exercised by the Federal Communications Commission under Title III was exercised by the Federal Radio Commission pursuant to the Radio Act of 1927, 44 Stat. 1162. At that time the Interstate Commerce Commission regulated communications common carriers pursuant to the Interstate Commerce Act.[26] 41 Stat. 475. Section 1 of the Communications Act, 47 U.S.C. § 151 (1964), makes it clear that the purpose of the Communications Act was to

[25] The Radio Act of 1927, from which Title III of the Communications Act derived, was directed at the elimination of confusion, chaos and conflicting use of the radio spectrum. National Broadcasting Co. v. United States, 319 U.S. 190, 211-13 (1943). But CATV does not involve use of the spectrum, and the Act contains no standards for the regulation of this type of communication. However, if CATV were determined to constitute interstate communication by radio, difficult problems would arise concerning the Commission's present system of leaving a large measure of regulation to State and local authorities. The regulatory scheme for interstate communication by radio preempts the field and is "exclusive of State action." Allen B. Dumont Laboratories, Inc. v. Carroll, 184 F. 2d 153, 155 (3d Cir. 1950), *cert. denied,* 340 U.S. 929 (1951).

[26] In addition, the Postmaster General had certain jurisdiction over common carriers. S. Rep. No. 781, 73d Cong., 2d Sess. 1 (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934).

vest in one central body the authority formerly exercise by separate agencies with different statutory grants i one statute administered by one agency,[27] and additionall to confer certain specified new authority upon the agenc so established.[28]

Before the enactment of the Communications Act, on common carriers had been regulated under the Intersta Commerce Act. The relevant provisions of that Act we repealed by Section 602(b) of the Communications Act, U.S.C. § 602(b) (1964), and were reenacted as Title II the latter act. Only radio communication had been re nlated pnrsuant to the Radio Act of 1927, which was r pealed by Section 602(a) of the Communications Act, U.S.C. § 602(a) (1964), and was essentially reenacted Title III.

The structure of the Communications Act is compar tively clear. Title I 47 U.S.C. §§ 151-155 (1964), is entitl "General Provisions". It sets forth the purposes of t Act, establishes the Commission, defines the terms used a contains familiar organizational provisions. Section 1, Ti I, is captioned "Purposes of Act, Creation of Federal Co munications Commission". It states that "[f]or the pu pose of regulating interstate and foreign communicati by wire and radio", and for related purposes, "there hereby created a commission to be known as 'Feder Commmnications Commission'." Section 2(a), Title I, captioned "Application of Act" and states that "[*t*]

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27 *Ibid.*

28 For example, Section 307(b), 47 U.S.C. § 307(b) (1964), as origin enacted was a new provision authorizing the issuance of additional lice for stations not exceeding 100 watts in power. Similarly, Sections 325 anw 325(c), 47 U.S.C. §§ 325(b), (c) (1964), were new provisions desig to give the Federal Communications Commission control over broadcast stu in the United States used to furnish programs to be broadcast to the Un States from a foreign country. See S. Rep. No. 781, *supra*, at 6, 8; H.R. R No. 1918, 73d Cong., 2d Sess. 48, 49 (1934).

provisions of this Act shall apply to all interstate and foreign communication by wire." (Emphasis added). Title II, 47 U.S.C. §§ 201-22 (1964), is entitled "Common Carriers" and deals only with common carriers "engaged in interstate or foreign communication by wire or radio," 47 U.S.C. § 201. Title III, 47 U.S.C. §§ 301-97 (1964), is entitled "Special Provisions Relating to Radio". Its purpose is set forth as, "among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission," 47 U.S.C. § 301. Title III confers broad powers upon the Commission to regulate radio transmission, including the power to issue radio station licenses, 47 U.S.C. §§ 303(e), 307(a); and licensing pursuant to the standard of "public convenience, interest, or necessity" is the basic instrument for the exercise of those powers. *Regents* v. *Carroll,* 338 U.S. 586, 597-98 (1950).[29]

Non-common carrier wire communication, whether or not interstate, does not fall within either of the two basic subject matters of regulation dealt with in the Act. It is not under Title II unless it is wire communication engaged in by a common carrier. Even if it should be conceded that CATVs engage in interstate wire communication, the Commission's consistent holdings that they are, nevertheless, not common carriers operates to exclude them from regulation under Title II. Similarly, CATVs are not subject to regulation under Title III because they are not engaged in radio communication.

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[29] The remaining titles of the Act which are not pertinent to the questions presented, are captioned "Procedural and Administrative Provisions" (Title IV; 47 U.S.C. §§ 400-10), "Penal Provisions" (Title V; 47 U.S.C. §§ 501-10) and "Miscellaneous Provisions" (Title VI; 47 U.S.C. 6010xxx; VI; 47 U.S.C. §§ 601-07).

B. Commission Regulation of Interstate Wire Communicatio by Non-Common Carriers

Once it is recognized that—whatever else CATV may b —it is neither a common carrier, nor engaged in radi transmission, it inevitably follows that CATV falls outsid the regulatory areas defined in Titles II and III of th Communications Act whether or not it has interstat impact.[30]

The Commission usually points out, however, that th term "communication by wire" in Sections 1 and 2(a) o the Act, is not limited to common carriers. And it is th use of the term in these sections which is relied upon by th Commission for the assertion of Commission authority ove CATV; and that such references in the Act constitute separate and independent grant of authority to regulat CATV activities.

Stated otherwise, the linchpin of the Commission's con tention is that Section 2(a) of the Act confers authorit over CATV as an activity in "interstate wire communica tion"; and, since the Commission has determined tha CATVs are not common carriers, that it has authority t regulate such non-common carriers engaged in wire com

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[30] The contention that CATV systems, such as the petitioner's, whose o erations are confined within a single state are nevertheless engaged in "inte state" communication by wire is subject to considerable question. Sectio 2(b) of the Act, 47 U.S.C. § 152(b) (1964), expressly precludes Commissio jurisdiction even over carriers "engaged in interstate or foreign communica tion solely through facilities connected with the facilities of another carrier" not under common control or "solely through connection by radio, or by wir and radio, with facilities located in an adjoining State or in Canada o Mexico . . . of another carrier" not under common control. In his separat opinion, concurring in part and dissenting in part to the First Report an Order, Commissioner Loevinger concluded from Section 2(b) and simila limitations contained in Sections 214, 221(b) and 301(d) of the Act, 4 U.S.C. §§ 214, 221(b), 301(d) (1964), that the intent of Congress wa ". . . to deny the Commission jurisdiction over intrastate carriers which ar not part of a single integrated system and which simply carry signal emanating from another State." First Report and Order, 38 F.C.C. 683 753-54 (1965). (See Appendix B hereto).

unication. If it does not have the claimed authority to gulate such non-common carriers the entire argument lls.

It is submitted that this essential basis of the Commis-on's claim to authority over CATV systems cannot be pported—that, on the contrary, under Section 2(a) of the t the Commission does not have authority to regulate ATVs engaged in wire communication and that this is so ether or not the wire communication is interstate. This manifest from the explicit terms of Section 2(a), which mit the Commission's authority to the "provisions of is Act"; the absence of any such "provisions", substan-ve or procedural, or authority relating to interstate wire mmunication by non-common carriers in general and ATV in particular; the legislative intent; and the history the Act's administration.

Section 2(a) states only that the "provisions of this Act all apply . . . to all interstate and foreign communication wire," but does not describe which *provisions* apply, in hich circumstances, under what terms, or to what extent. ch a delineation of authority—essential to valid delega-n to an administrative agency—is set out in the other ovisions of the Act. It is indisputable, based on a search-ng and meticulous examination, that the Act is devoid of y single provision granting regulatory authority over n-common carriers engaged in wire communications.[31] he absence of any such regulatory provisions relating to

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[31] For this reason cases such as National Broadcasting Co. v. United States, 3 U.S. 190 (1943), and American Trucking Assn's v. United States, 344 U.S. 2 (1953), and by the District of Columbia Circuit in Buckeye Cablevision I. v. FCC, No. 20274 (D.C. Cir., June 30, 1967), are irrelevant. Those cases d lt only with the scope of regulatory authority over persons or entities (e.g., ntor carriers and radio station licensees) already recognized to be subject t some regulatory authority. They are not precedents with respect to the ension of administrative authority to entities or persons not covered by t relevant statute at all.

non-common carriers engaged in wire communication when contrasted with the comprehensive regulatory regim governing radio and common carriers spelled out in d tailed provisions implementing Section 2(a), clearly r veals the purpose of the Act to regulate common carrier but not to regulate non-common carriers engaged in wi communication.[32]

In fact the Act confers upon the Commission only thr functions with respect to wire communications generall i.e., functions not limited to common carriers. Section 4(o 47 U.S.C. § 154(o) (1964), directs the Commission to "i vestigate and study" problems relating to the maximu effective "use of radio and wire communication . . . [they relate to the] safety of life and property." And Se tion 4(k), 47 U.S.C. § 154(k) (1964), directs it to mal

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[32] The terms "wire communication" or "communication by wire" appe in a number of sections of the Act other than Sections 1 and 2(a). Th one or the other term is used in a number of the provisions of Title II, ho ever only in connection with common carriers. Moreover, the terms may a be found in Sections 2(b), 3(a), 3(e), 4(b), 4(k), 4(o), 406, 410(a), 4 502, 503(a), 602(b), 602(d), 604(e), 605 and 606 of the Act, 47 U.S §§ 152(b), 153(a), 153(e), 154(b), 154(k), 154(o), 406, 410(a), 412, 5 503(a), 602(b), 602(d), 604(e), 605, 606 (1964). A number of these pro sions are also expressly confined in their impact to common carriers, e. Sections 406, 503(a) and 604(e). Others do have a direct or indirect i pact upon non-common carrier wire communication. Section 605 prohibits w tapping and is not limited to common carrier communication. Section 6 confers certain emergency powers upon the President—not upon the Co mission—with respect to all forms of wire communication, but "during t continuance of a war" only. The limitation on financial interests of Fede Communication Commissioners, contained in Section 4(b), is not limited interests in common carriers. Section 4(k) requires the Commission to ma annual reports to Congress containing information that the Commission m consider "of value in the determination of questions connected with t regulation of interstate and foreign wire and radio communication and ra transmission of energy." Similarly, Section 4(o) directs the Commission investigate and study matters relating to "the use of radio and wire co munications in connection with safety of life and property." Section 3(is merely a definition and serves only the normal purpose of a statutory defi tion. Thus these references to "wire communication" or "communicati by wire" contained in the Act clearly establish no general system for t regulation of non-common carrier wire communication.

nnual reports to Congress and provides that the reports hall contain "specific recommendations as to additional egislation" and are to contain information collected by he Commission "of value in the determination of questions onnected with the regulation of interstate and foreign wire nd radio communication." The limitation of an agency's unction with respect to a specific subject matter to study, nvestigation and recommendation to Congress is familiar. *PC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 05 (1949). In addition, Section 605, 47 U.S.C. § 605 1964), prohibits wire tapping with respect to "any inter- ate or foreign communication by wire or radio," and the ommission has comprehensive regulatory powers to effec- uate that prohibition. *Benanti* v. *United States*, 355 U.S. 3 (1957). These three functions do not, of course, estab- sh a general system for the regulation of non-common arrier wire communication.

The legislative history of the Act expresses the clear and nequivocal intent not to confer on the Commission regu- tory authority over non-common carrier wire communi- tion. The statement of the managers on the part of the ouse, included in the Conference Report, noted that the enate version of Section 3(h), 47 U.S.C. § 153(h) (1964),[33] ld been adopted and stated:

> It is to be noted that the definition does not include any person if not a common carrier in the ordinary sense of the term, *and therefore does not include press associations* or other organizations engaged in the business of collecting and distributing news services which may refuse to furnish to any person service which they are capable of furnishing, and may furnish service

[33] Section 3(h) of the Act provides that " 'common carrier' or 'carrier' eans any person engaged for hire, in interstate or foreign communication wire or radio or in interstate or foreign radio transmission of energy, except here reference is made to common carriers not subject to this Act; but a erson engaged in radio broadcasting shall not, insofar as such person is so gaged, be deemed a common carrier."

> under varying arrangements, establishing the servi
> to be rendered, the terms under which rendered, ar
> the charges therefor.

H.R. Rep. No. 1918, 73d Cong., 2d Sess. 45-46 (193
(emphasis added).[34] To treat Sections 1 and 2(a) as ind
pendent sources of regulatory authority would require
conclusion that the draftsman smuggled authority in
those sections which they deliberately excluded from Tit
II.[35]

Nor may it be argued that the Commission's asserte
power over CATV differs from its clear lack of authori
over the press and other non-common carriers engaged
communication by wire for the reason that such groups a
not involved in and do not have an impact on broadcastir
The fact is that radio and television networks are similar
engaged in communication by wire, and their involveme
with and impact upon broadcasting in general and televisi
in particular is profound. And it is also the fact that t
Commission has not asserted jurisdiction over networ
On the contrary, the Commission has repeatedly and e
plicitly disavowed authority over the networks. Thus,
Don Lee Broadcasting System, 5 P&F Radio Reg. 11
1197-98 (1949), the Commission stated:

> The network regulations are designed to insure th
> control of the individual stations is not forfeited to
> network organization with which such stations a
> affiliated. The networks, as such, are not licensed
> the Commission and are under no statutory obligati
> to serve the public interest. The Chain Broadcasti
> Regulations, therefore, are designed to govern the co
> duct of the individual stations rather than the networ
> . . . .

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[34] See also H.R. Rep. No. 1850, *supra* note 26, to the same effect.

[35] In this connection it it noteworthy that CATV systems carry and origin
news programs.

The analogy between CATV operations over which the Commission has presumed to assert authority, and network operations where the Commission has disavowed authority is striking, and on "all-fours". Networks are engaged in transcontinental communication by wire for the purpose of "carriage" of television broadcast programs.[36] The availability of net work programs and indeed the availability of net work affiliation agreements is frequently crucial to the difference between success and failure of television broadcast operations and particularly UHF station operations.[37] Regulation of networks by the Commission could be a highly effective means of attaining Commission objectives not otherwise attainable, including its allocation plan for off-the-air service and service to local communities. One direct means of encouraging UHF broadcasting would be a requirement that networks accept as affiliates a certain percentage of UHF broadcasters.

The Commission, however, has never asserted that its general regulatory powers may be exercised upon the networks in order to foster its plan for allocation of television service.[38] Instead, it has expressly advised Congress that "The Commission has no jurisdiction over networks as such and the Commission does not have authority to license

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[36] It is irrelevant to the question presented that networks lease lines from telephone common carriers. But in any event many CATV systems also lease lines from the same companies and for the same purpose. And the Commission in asserting jurisdiction over CATVs does not distinguish between systems which own and those which lease their lines.

[37] "The inability of most UHF stations to obtain network affiliation, or, if affiliated, to obtain sufficient network commercial programs was an important factor in the limited development of the UHF service." Network Broadcasting, Report of the Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85th Cong., 2d Sess. 226 (1958).

[38] Thus, the chain broadcasting regulations involved in National Broadcasting Co. v. United States, *supra*, note 31, were "addressed in terms to station licensees and applicants for station licenses" and not to networks, 319 U.S. at 198.

or regulate networks''[39] and that the Commission ''canno reach networks directly''.[40] When it has deemed it desir able to exercise direct regulatory authority over networks it has sought such authority from Congress.[41] Based o fact, logic and law the assertion by the Commission of juris diction over networks is a flat and absolute contradictio And the assertion of jurisdiction over CATVs cannot b defended in the light of the Commission's opposite answe over the course of more than three decades to the identica question presented with respect to networks. On the co trary, since the Commission has not presumed to clai jurisdiction over the networks which are the lifeblood o broadcast operations, how can it validly assert such a thority over CATV?

The compelling conclusion that the Commission does n have authority over wire communication by non-commo carriers also is supported by the consistent and unifor practice of the Commission in other areas over an extende period of time. For years non-common carrier wire co munication systems have been in extensive use and have n been subjected to regulation by the Commission. In add tion to the press services, hundreds of mil

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[39] H.R. Rep. No. 1297, 85th Cong., 2d Sess. 628 (1957).

[40] Hearings before a Subcommittee of the House Committee on Interst and Foreign Commerce, *Responsibilities of Broadcasting Licensees and Stat Personnel*, 86th Cong., 2d Sess. 672 (1960).

[41] With the support of the Commission, two bills were introduced in t 86th Congress. One was H.R. 5042 (entitled in part ''A Bill To Amend t Communications Act of 1934 To Subject Television Networks to Cert Controls''), and the other was H.R. 11340 (entitled in part ''A Bill To Am the Communications Act of 1934 . . . To Provide for the Regulation National Networks''). H.R. 5042 provided authority for the Commission make rules and regulations directly applicable to the television networks, w H.R. 11340 provided for the exercise of regulatory authority over the netwo under a mandatory system of licensing national networks. Each was desig to give the Commission specific regulatory authority over the networks. H.R. Rep. No. 281, 88th Cong., 1st Sess. 149-50 (1963). Neither bill w enacted, and similar legislation, introduced in the 87th Cong., 1st Sess. S. 2400, also failed of enactment.

of private non-carrier communication systems have been operated (some as early as 1851) by railroads, electric power, petroleum and natural gas pipeline companies with rights of way or similar facilities which make it practical for them to do so. See *AT&T (Railroad Interconnection)*, 32 F.C.C. 337 (1962). The railroad industry alone maintained over 200,000 miles of pole line in 1957.[42] Yet the Commission has never—before it asserted authoriy over CATV—undertaken to regulate the operation of such systems.[43] Thus, while the annual reports of the Commission make reference to Sections 1 or 2(a), the functions they describe include only the regulation of common carriers and radio communication; they do not refer to non-common carrier wire communication.[44]

C. The Communications Act Provides None of the Required Substantive and Procedural Standards for Regulation of Wire Communication by Non-Common Carriers.

The structure of the Communications Act is such that the assumption that the Commission has authority to regulate non-common carrier forms of wire communication leaves it wholly without statutory standards for the exercise of the authority. In sharp contrast, the Act does contain both general and detailed standards for the regulation of radio communication and common carriers. The licensing power which the Commission exercises with respect to radio under Title III must be administered in the

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42 See In the Matter of Allocation of Frequencies in the Bands Above 890 mc, 27 F.C.C. 359 (1959).

43 The only area affecting such private wire communication systems which the Commission undertakes to regulate relates to whether the practices of common carriers, subject to Commission authority, permitting or denying the private wire communication systems to interconnect with the carriers are discriminatory. AT&T (Railroad Interconnection), 32 F.C.C. 337 (1962). This, of course, represents a regulation of the carriers, not of the non-carrier wire communication system seeking interconnection.

44 See, *e.g.*, 18 F.C.C. Ann. Rep. 13, 15 (1952); 28 F.C.C. Ann. Rep. 15 (1962); 31 F.C.C. Ann. Rep. 10 (1965).

"public interest, convenience, or necessity", a standard found adequate in *Federal Radio Commission* v. *Nelson Bros. Bond and Mortgage Co.*, 389 U.S. 266, 285 (1933), and *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-27 (1943), in the light of its context, the purposes of the Act and the requirements it imposes. Similarly, the standards used for the regulation of common carriers pursuant to Title II are familiar and adequate for public utility regulation.[45] These general standards are given flesh in numerous provisions of the Act dealing with substantive, procedural and remedial matters relating to the regulation of common carriers and radio communication. Those provisions incorporate the basic legislative standards governing the regulatory authority conferred on the Commission. They specify with care, precision and detail the substantive and procedural criteria for regulation under Title II[46] and under Title III.[47]

Moreover, the Act expresses an explicit concern with areas of radio and common carrier activities excluded from

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[45] *E.g.*, Section 201 requires charges, practices, etc., to be "just and reasonable" and Section 214 requires certificates of "public convenience and necessity" for common carrier operations.

[46] *E.g.*, unjust and unreasonable discriminations, 47 U.S.C. § 202(a); the use of franks and passes, 47 U.S.C. § 210(a); adequacy of facilities, extension of lines and public offices, 47 U.S.C. § 214(d); required records and depreciation practices, 47 U.S.C. § 220(a)(b); length of suspension of new charges, and hearing requirements, 47 U.S.C. § 204; court injunction involving reductions or extensions of service, 47 U.S.C. § 214(e); cease and desist authority, 47 U.S.C. § 205(a); claims for damages in proceedings instituted either in the courts or before the Commission, 47 U.S.C. §§ 206, 207, 208 and 209.

[47] *E.g.*, classification of radio stations, including areas and zones served and power and time of operation, 47 U.S.C. § 303; restrictions on grants to aliens, 47 U.S.C. § 310; operation of transmitting apparatus by licensed operators, 47 U.S.C. § 318; standards for distribution of licenses, frequencies, hours of operation and power among the several states and communities, 47 U.S.C. § 307(b); terms of licenses and standards, as well as procedural requirements governing renewals, 47 U.S.C. §307(d); and substantive and procedural conditions governing modification, suspension and revocation of licenses, 47 U.S.C. §§ 303(f), 303(m), 312 and 316.

regulation by the Commission and, therefore, subject to regulation by the states.[48] An assertion of plenary Commission jurisdiction over CATV based solely upon the language of Sections 1 and 2(a) must assume that Congress was wholly unconcerned with problems relating to the appropriate areas of state and federal regulation over non-common carrier wire communication. This assumption flies in the face of its disclosed and explicit concern with respect to radio and common carrier regulation.

No such similar panoply of substantive and procedural provisions may be found in the Act with respect to wire communication engaged in by non-common carriers. The general regulatory provisions relied upon by the petitioners qualify the power granted with limitations such as "not inconsistent with this Act, as may be necessary in the execution of [the Commission's] *functions*" (Section 4(i)); "not inconsistent with law as it may deem necessary . . . to carry out the *provisions* of this Act" (Section 303(f)); "or as may be necessary to carry out the *provisions* of this Act" (Section 303(r), emphasis added). However, with respect to non-common carrier wire communication there are no "provisions of this Act" or Commission "functions" defined elsewhere in the Communications Act to give meaning or limit to these general regulatory powers. And in the absence of any substantive and procedural authority or limitation, the Commission's argument is reduced to the contention that the Commission has the jurisdiction to regulate CATV, i.e., wire communication conducted by non-carriers, for such purposes and by such means as it may consider appropriate.

A further difficulty with the FCC's position is that it chooses from only one of the multitude of objectives contained in the Act, some of which relate to radio communication and some of which relate to common carriers, to provide the required standards. The *Second Report and Order*

[48] See note 30, *supra*.

D. The Commission's Claim to Regulatory Authority Over Non-Common Carrier Wire Communication Is Wholly Inconsistent With Its Historic Administrative Practice.[50]

The Government does not attempt to argue that the provisions of the Act it cites and which confer substantive powers upon the Commission, even when combined with the general regulatory provisions, authorize it to regulate activities or entities not otherwise subject to Commission jurisdiction. Nor can that contention be made. This is the essential holding of *Regents* v. *Carroll,* 338 U.S. 586 (1950), which confirmed the power of the Commission to require a radio licensee (i.e., a subject of its regulatory authority) to disaffirm a contract as a condition of renewal of license. However *Regents* also held that this authorized action of the Commission could not operate to prevent the other party to the contract—a non-licensee—from obtaining appropriate relief for the breach of contract. Indeed, if the law were otherwise it would operate to extend the Commission's jurisdiction to activities which may be so conducted as to have an incidental or even direct impact upon the Commission's allocation plan for off-the-air television service, but which are beyond the Commission's competence to regulate—e.g., the production and distribution of motion pictures, the activities of the press, broadcasting network practices,[51] or before the All-Channel Receiver Law, 47 U.S.C. § 303(s) (1964), was enacted, the shipment of television sets in commerce.

As the Commission usually points out, the inability until recently of most television sets to receive UHF signals

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[50] Microwave relay systems are clearly a form of radio communication. In consequence, cases dealing with Commission jurisdiction over such systems, e.g., *Carter Mountain Transmission Corp.* v. *FCC,* 321 F. 2d 359 (D.C. Cir.), *cert. denied,* 375 U.S. 951 (1963), and *Idaho Microwave, Inc.* v. *FCC,* 352 F. 2d 729 (D.C. Cir. 1965), are irrelevant. Moreover, in each case the microwave service involved was a common carrier.

[51] See *supra,* pp. 41-44.

epresented a formidable obstacle to the development of JHF broadcasting and therefore to effectuation of the Commission's assignment plan. However, the Commission nade no attempt to contend, as it has with respect to ATV, that interstate shipment of sets equipped to receive nly VHF affected and threatened to disrupt its plan for ff-the-air television service and therefore is subject to the Commission's general regulatory powers. Rather, as it id with respect to networks, and CATV it requested legisation, empowering it to deal with the problem. In so oing it frankly stated:

> In the Communications Act of 1934, Congress vested the Federal Communications Commission with the responsibility of making available to all people of the United States, an efficient and nationwide communications service, and certain authority to carry out these responsibilities. Our request for this legislation is an expression of our feeling that in the area of television reception systems, our present authority is not commensurate with our responsibilities . . .[52]

In sum, the Commission regards CATV as a form of ire communication, but not as one conducted by common rriers; since, as demonstrated above, no provisions of ie Act confer general regulatory authority over non-comon carriers engaged in wire communication, the Commison lacks authority over the subject matter.

Accordingly, if the Commission considers regulations appropriate it must seek authority and direction from Conress. And, in fact, after concluding that it lacked regulary authority in 1959, *CATV and Repeater Services,* 26 C.C. 403 (1959), the Commission did seek appropriate gislation. The continuing and repeated efforts to obtain

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[52] Hearings on H.R. 8031 Before the House Committee on Interstate and Foreign Commerce, 87th Cong., 2d Sess. 7-8 (1962).

such legislation are set forth in Appendix C hereto.[53] The Commission's failure to obtain such legislation strongly suggests a Congressional awareness and acquiescence in the Commission's 1959 determination that it lacked such jurisdiction.[54] This acquiescence is entitled to great weight *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396-397 (1956). See also *Norwegian Nitrogen Products Co.* v *United States*, 288 U.S. 294 (1956).

The precise question here presented is whether non-microwave CATV may, as a form of wire communication conducted by non-common carriers, be regulated by the Commission pursuant to the Communications Act. It is submitted that the foregoing discussion amply supports the conclusion that the Communications Act confers no general regulatory authority over such wire communication upon the Commission and that, therefore, CATV is not subject to such regulation.

This conclusion obviously does not preclude an act of Congress conferring regulatory authority over CATV upon the Commission or some other body. Moreover, such legislation would supply answers to a host of questions which an assumption of plenary jurisdiction under Sections 1 and 2(a) give rise, including: Shall CATV be licensed and if so by whom and for what period? Shall CATV systems pay a franchise fee or rather, as in broadcast, shall the license be granted free? Shall the rates charged by CATV to the

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53 The Commission's description of these efforts through the 88th Congress are set forth at note 5, *supra*. Appendix C also describes the legislative treatment of CATV in the 89th Congress and discloses that nothing has since occurred to indicate the existence of any different Congressional view.

54 Such efforts to obtain legislation are pursuant to the mandate of Section 4(k)(1) of the Act to make annual reports to Congress on "such information and data collected by the Commission as may be of value in the determination of questions connected with the legislation of interstate and foreign wire and radio communication and radio transmission of energy" and Section 4(k)(5) to make "specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable."

viewer be regulated and if so, by whom and upon what basis?

Although the Commission has undertaken to answer some of these questions and refrained from answering others, its claim to plenary jurisdiction necessarily involves a claim of authority to answer all. The answers which it has furnished have been supplied without any statutory guidance or direction and are at variance with the explicit directions of Congress in conferring authority on the Commission under Titles II and III.

The Commission's Memorandum Opinion and Order here involved (R. 0015-0018) cannot be supported by resort to Sections 4(i) and 303(r) which are general regulatory provisions of the Communications Act.

First, this contention would assume that the Commission does have authority to regulate non-microwave CATV systems and the argument would fail in any event if, as argued, *supra,* the Commission does not have such authority.

The powers which the Commission reads into Sections 4(i) and 303(r) could affect far more than CATV, and could well govern other activities subject to regulation under the Communications Act. Sections 4(i) and 303(r) of the Communications Act are framed in language familiar in statutes conferring conventional powers upon an administrative agency. The general language of these sections requires that this question be tested in the light of the structure of the Act and its legislative history, rather than by sweeping cliches of statutory interpretation which literally assume the answer to the question presented.

Section 4(i), 47 U.S.C. § 154(i) (1964), provides as follows:

> "(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

Section 303(r), 47 U.S.C. § 303(r) (1964), provides that the Commission shall:

> "(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party."

This task is made more difficult because the problem arises in the context of the Commission's asserted jurisdiction over CATV. As pointed out above the Communications Act is replete with explicit provisions which give meaning and limitation to the substantive and procedural powers granted to the Commission in areas it was expressly intended to regulate. For example, Section 316(a) of the Act, 47 U.S.C. § 316(a) (1964), expressly authorizes the Commission for stated reasons to "modify a station license or construction permit". This power to modify is available when the Commission has permitted a station to transmit signals in a manner that interferes with other legitimate uses of the radio spectrum. Nevertheless, Section 316(a) expressly requires that before the Commission modifies a license the licensee must be accorded a hearing if he so requests; and Section 316(b), 47 U.S.C. § 316(b) (1964), provides that at the hearing "both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission."

It is therefore clear that the limiting impact of provisions of the Act relating to fields other than CATV would not permit the language of Sections 4(i) and 303(r) to operate in those fields with the same expansive and unlimited meaning claimed with respect to CATV. Since the Act does not deal with non-carrier wire communication, it does not contain similar sources of illumination and limitation. Para-

doxically, it is this very lack upon which the Government relies to support the Commission's claim that its authority to regulate CATV must encompass all that is necessary to prevent frustration of the Act's purposes.

As we have earlier noted, this is but another way of claiming that not only has Congress directed the Commission to regulate CATV, it has directed it to do so pursuant to any procedures the Commission sees fit to adopt. Such a contention is so patently at odds with the Administrative Procedure Act and standards for the delegation of powers that it must be rejected out of hand. Rather, it is necessary to look both to Sections 4(i) and 303(r) themselves and to a complex of relevant background in order to determine whether these provisions in fact confer the injunctive powers claimed.

The language of Sections 4(i) and 303(r) evidence no intention to give to the Commission broad regulatory jurisdiction over industries or businesses not included otherwise within the scope of the Communications Act.[55] Indeed, the language justifies the conclusion that these sections are basically enabling provisions intended to implement the specific provisions of the statute, not general grants of independent substantive authority which authorize the action taken in this case against Petitioner which makes no use of the radio spectrum. See *FCC* v. *American Broadcasting Co.*, 347 U.S. 284, 289-90 (1954). Their scope must be measured by reference to the express provisions and purposes contained in other sections of the Act. *Alabama Elec. Coop., Inc.* v. *SEC*, 353 F. 2d 905 (D.C. Cir. 1965), cert. denied, 383 U.S. 968 (1966). Thus, for example, these sections are validly employed to issue rules governing radio stations engaged in network broadcasting in view of the

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[55] The legislative history of Section 4(i) is set forth in Appendix D hereto; the legislative history of Section 303(r) is set forth in Appendix E hereto.

express authority conferred over such activities.[56] *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943). Similarly, the sections are properly employed to implement the express Congressional policy against monopoly enunciated in the Communications Act by limiting the number of stations under common ownership or control. *Storer Broadcasting Co.* v. *United States,* 240 F. 2d 55 (D. C. Cir. 1957).[57]

The legislative history of Section 4(i) (set forth in Appendix D) demonstrates no intent by Congress to make a broad grant of the extraordinary powers here involved. Section 4(i) was derived from a provision of the Interstate Commerce Act, 49 U.S.C. § 17(3) (1951), which was designed to permit the ICC to control "the order and regulation of proceedings before it."[58] It was desired that the new commission have similar powers, and Section 4(i) was described "as more general in terms and may be sufficient in scope to cover rules of practice and forms of pleading." (Appendix D). The legislative history makes it abundantly clear that this section was conceived as limited and narrow in scope, and not as a source of administrative injunctive power.

Section 303(r) was not part of the original Communications Act of 1934, but was enacted in 1937 as a consequence

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[56] Section 303(i) of the Act, 47 U.S.C. § 303(i) (1964), provides that the Commission shall "Have authority to make special regulations applicable to radio stations engaged in chain broadcasting."

[57] See Section 313 of the Communications Act, 47 U.S.C. § 313 (1964).

[58] Subsection 4(i) of the Communications Act is contained in the Section entitled "Provisions Relating to the Commission" which sets forth and deals with such administrative matters as the number and salaries of the Commissioners; the location of the principal office; the employment of staff members; the fixing of payment of overtime to staff engineers; the making of expenditures for rent; expenses for supplies, books, periodicals, etc. The subsection immediately preceding 4(i) defines a quorum and provides: "The Commission shall have an official seal which shall be judicially noted." 47 U.S.C. § 154(h) (1964).

of unfortunate losses of life on the high seas in the *Morro Castle* and *Mohawk* disasters. The legislative history of the provision (set forth in Appendix E) shows that the only purpose of the provision was to extend the Commission's general regulatory and rule making powers to make it possible to give effect to "any international radio or wire communication convention" relating to safety at sea. Reliance on this provision to support sweeping and general injunctive powers by the Commission is wholly untenable.

I. THE COMMISSION CANNOT DEPRIVE THE PUBLIC OF ITS RIGHT TO RECEIVE AND SELECT TELEVISION PROGRAMS OF ITS CHOICE WITHOUT PROOF OF ADVERSE EFFECT UPON THE PUBLIC INTEREST

In this case, the Commission has simply rested its decision (R. 0015-0018), ordering Petitioner to black out certain television channels from its subscribers' view, upon its findings in the *Second Report and Order.* (R. 0016). Besides resting the Commission's authority on the tenuous grounds of the provisions discussed in Part I of this Argument, *supra,* which do not grant jurisdiction to the Commission over Petitioner who is not engaged in business as a common carrier by wire or in broadcasting in any form within the meaning of the Communications Act, the *Second Report and Order* bases the non-duplication rules (Appendix A, herein) upon the Commission's purpose "to insure that the local station is presented on the cable and to protect the local stations against the unfair competitive disadvantage and prejudicial effect to which they are subject by the duplication of their programming on the signals of distant stations." (*Second Report and Order,* 2 FCC 2d 25 in 1966, paragraphs 131-137; see, also, Opposition of the FCC and the United States to Petitioner's Motion For Stay in this case, pages 1 & 2).

The fallacy of the Commission's contention is that the Courts have held that there is no unfair competition in-

volved in a CATV system carrying either distant or loca
television stations' signals as they are received.[59] Th
FCC has not been given authority to overrule the Court
in matters involving questions of unfair competition. I
fact, the Communications Act does not grant authority t
the Commission to devise rules to present unfair competi
tion by anyone, let alone by persons not subject to the Com
mission's jurisdiction, such as Petitioner. This is au
thority which, if it exists at all in a Federal agency, i
placed under the jurisdiction of the Federal Trade Com
mission.

Furthermore, the Commission's efforts to protect th
local station is based upon the false premise that a tele
vision station bargains for exclusivity of network program
ming throughout its Grade B contour or coverage area
The fact is that a television station cannot under telev
sion network practices and FCC Rules bargain for exclu
sivity of network programs except in its principal com
munity, and it bargains only for the exclusive right t
broadcast, as against any other television stations, th
programs within the principal community which it serve
It does not obtain exclusivity against the reception c
programs by a CATV system's subscribers and copyrigh
holders have offered to bargain with CATV operators fc
the purchase of the rights to such reception, if such right
must be purchased by the CATV operator. If the Su
preme Court of the United States should uphold the d
cision of the lower courts in the case of *United Artist
Television, Inc.* v. *Fortnightly Corporation*,[60] CATV sy
tems will be liable for payment of copyright not only for th

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[59] *Cable Vision, Inc.* v. *KUTV, Inc.*, 335 F. 2d 348 (9th Cir. 1964), ce
den. 379 U.S. 989 (1965); *Intermountain Broadcasting & Television Corp.*
Idaho Microwave, Inc., 196 F. Supp. 315 (D. Idaho 1961).

[60] 255 F. Supp. 177 (S.D.-N.Y. 1966); 377 F. 2d 872 (2nd Cir. 1967
Fortnightly Corporation v. *United Artists Television, Inc.* on *certiorari* befc
the Supreme Court of the United States (Case No. 618), October Term, 19(

future reception of television programs but, under the statute of limitations in the Copyright Act, for three years prior to the time they are sued. Along with the penalties incurred for past non-payment of copyright, the costs of doing business will be phenomenal for the CATV operator.

This shows the tenuous position of the Commission in attempting to base its non-duplication rules upon the past and current practice of CATV systems under which they do not pay for programs received off-the-air, as distinguished from copyrighted programs which some systems originate in their studios and for which they pay copyright. Will the Commission then be able to right the situation and reimburse the CATV operator for his losses due to adherence to the Commission's non-duplication rules? Obviously, no.

The non-duplication rules are designed strictly to protect the television broadcasters and networks, without any proof being required by the Commission to the effect that they are injured financially or threatened to be injured financially to the extent that the public interest is adversely involved. (R. 30, 34).

The Commission itself has recognized that its Rules may have to be changed if the Supreme Court of the United States upholds the courts' decisions in the *Fortnightly* case (footnote 60, *supra*). In its *Second Report and Order,* the Commission stated:

> "In short, if the copyright suits are decided adversely to the CATV industry, we may, as stated in the First Report, have to revise our rules."[61]

Neither the Commission nor Intervenor, KVOS-TV, has alleged or found, let alone proven, that the operations of Petitioner have adversely affected KVOS-TV in a financial way. Neither have they alleged or found that the public

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[61] Second Report and Order (31 F.R. 4540), par. 108.

interest will suffer or is likely to suffer from Petitioner's operations. The *Second Report and Order* likewise contained no such proof. The National Cable Television Association, Inc. of Washington, D. C., the only national trade association for the CATV industry, for itself and its members, including Petitioner, has filed pleadings in the proceedings which led to the issuance of the *Second Report and Order* pointing out that no proof was adduced in those proceedings to the effect that broadcasters were injured to the extent that the public would be adversely affected, but the Commission issued the *Second Report and Order* nevertheless. In the Memorandum and Opinion in this case, it has ruled again that an argument that KVOS-TV would not be prejudiced by a grant of waiver even if true would not be persuasive. (R. 0015, para. 2).

The Commission's Memorandum Opinion and Order in this case contradicts the holding of the Courts that the burden of proof is on the complaining television station to show that the public interest, as distinguished from its own pecuniary interests, will be hurt.[62]

Petitioner averred that insistence by the Commission upon imposing these arbitrary and capricious rules will cause Petitioner to lose many subscribers and thus be deprived of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. Furthermore, the Commission's Rules, if upheld would require Petitioner to spend several thousands of dollars in obtaining personnel in order to switch the programs off and black out the channels or to purchase an expensive time-clock which is designed to do this automatically, or to do both of these things. Petitioner pointed out that time-clocks are not reliable and they can involve Petitioner unwillingly and unwittingly in a violation of the

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62 *Carroll Broadcasting Co.* v. *FCC*, 103 U.S. App. D.C. 346, 258 F. 2d 4 (1958).

Rules and subject it to punishment by the FCC. (R. 31 & 32). All of Petitioner's allegations, such as that Intervenor, KVOS-TV, did not need this protection and that the public would be deprived of certain programs of its choice were supported by affidavit, as required by the Commission's Rules. Intervenor's Opposition did not have an affidavit attached to it, as required by the Commission's Rules. The Commission's Memorandum Opinion and Order in this case is not based upon evidence in the Record and deprives Petitioner and the public of due process of law contrary to the Fifth Amendment to the Constitution of the United States. (R. 36).

III. THE COMMISSION CANNOT APPLY ITS NON-DUPLICATION REGULATIONS TO PETITIONER WHICH WAS IN OPERATION BEFORE THE COMMISSION ASSERTED ITS JURISDICTION

Again, if it were conceded, *arguendo*, that the Commission could regulate CATV systems, the Commission cannot apply its regulations to a CATV system which was in operation before the Commission asserted its jurisdiction in a way which causes the CATV system to lose subscribers or which threatens its continued existence.

Petitioner was in operation since May of 1960. (R. 21). At that time the Commission had not attempted to exercise jurisdiction over CATV systems and had actually refused to regulate them. In the year before Petitioner began the operation of its CATV system, the Commission had decided unanimously that it did not possess jurisdiction to regulate CATV systems. (R. 21 & 22).

Petitioner had a right to rely upon the Commission's action in agreeing with its subscribers to carry the signals of distant television stations. After Petitioner has incurred expenses of many thousands of dollars in constructing and operating a CATV system, the Commission cannot apply to his business the restriction of blacking out certain

distant television signals and exposing Petitioner to th loss of many thousands of dollars and possibly eventual to financial demise. This is a deprivation of proper without due process of law contrary to the Fifth Amen ment to the Constitution of the United States.[63] This co clusion follows, regardless of whether the Commission ca exercise this autority over CATV systems which went in operation after the effective date of the *Second Report an Order.*

IV. THE COMMISSION CANNOT ABRITRARILY DISCRIMINAT AGAINST PETITIONER'S SUBSCRIBERS AND DEPRIV THEM OF THE OPPORTUNITY TO VIEW TELEVISIO PROGRAMS AVAILABLE TO OTHERS IN THE SAM COMMUNITY

Even if the Commission did have jurisdiction over CAT systems, it could not arbitrarily discriminate betwee CATV subscribers and the general public by prohibitin the CATV subscribers only from viewing certain dista television programs available to all in the CATV com munity. Still, that is precisely what the Commission Memorandum Opinion and Order in this case accomplishe

The Commission knows that when a CATV subscriber connected to the CATV system, he generally expresses wish to have his roof-top antenna disconnected from h television set and to have the antenna removed. This l does for aesthetic reasons, because he prefers not to hav an ugly antenna on his roof; for reasons of safety, becau he does not run the risk of the antenna falling and dama ing his roof or injuring a passerby or an occupant; fo reasons of economy, because he can often obtain a reductio in his home insurance. When a CATV operator receiv all the local stations and all the distant stations which l

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[63] See concurring opinion in *Southwestern Cable Co. et al.* v. *United Sta of America and Federal Communications Commission,* 378 F. 2d 118—C. 9, 1967.

can receive, as Petitioner does, no one is injured by the antenna being removed.

However, the Commission's non-duplication rules work a real hardship on the CATV subscriber, as well as the CATV operator, when all the television signals encompassed by the Commission's Rules are receivable in the CATV community with the use of regular antennas, such as rabbit-ears or roof-top antennas. This is the situation in Port Angeles, Washington. In such a case, the non-duplication rules do not prevent the public from viewing the distant stations' television signals by use of roof-top or other antennas, but they deprive solely the CATV subscribers from viewing these distant signals by causing the CATV operator to black out certain signals from distant television stations. This causes the CATV operator to lose many subscribers and, in communities like Port Angeles where all the signals can be received off-the-air, it can cause the CATV system's demise.

Furthermore, even if the non-duplication rules were sustainable in principle where a CATV system is denied the right to receive the signals of television stations which are not receivable in the CATV community except via the CATV system, they cannot logically be applied where the result of the rules is nil. The rules will not accomplish the result they were designed to achieve. If CATV subscribers in Port Angeles cannot view the programs of Seattle television stations on their sets when connected to the cable, they will simply revert to the use of roof-top antennas and settle for a viewable though inferior picture. The result will not be to protect Intervenor, KVOS-TV, but it will nevertheless injure financially Petitioner. Duplication by competing television stations will continue. The non-duplication rules under the circumstances are discriminatory as against Intervenor and its subscribers and violative of due process of law in contravention of the Fifth Amendment to the Constitution of the United States. The

public's right to view television programs of its choic cannot be curtailed by the Government on this specious pretext. *Weaver* v. *Jordan,* 411 Pac. 2d 289 (1966).

The Commission's policies are discriminatory in anothe regard. The Commission has allowed KIRO-TV to instal a translator which beams its programs into Port Angele without requiring the translator to refrain from duplicat ing KVOS or any other television stations' programs. A translator broadcasts and it can reach many more person than Petitioner's CATV system. Apparently the Commis sion and KVOS-TV do not fear this fragmentation of th audience of KVOS-TV or of other television stations, be cause the Commission has made the grant of a license t the translator and KVOS-TV has apparently not contested the grant. This discrimination is inexplicable and does no meet the due process of law standard of the Fifth Amend ment to the Constitution of the United States. Is th answer that the operators of the translator and of KVOS TV are fellow broadcasters?

V. THE COMMISSION CANNOT IN COMBINATION WITH INTER VENOR PREVENT ADVERTISING FROM DISTANT TELEV SION STATIONS FROM BEING RECEIVED BY CATV SUB SCRIBERS IN PORT ANGELES

The Commission's non-duplication rules involve pro hibiting the advertising from distant television station (from two Seattle stations in this case) from being re ceived in Port Angeles, Washington, *only if local broad caster requests non-duplication protection.* The Commi sion knows that some of the commercials from the tw Seattle stations will not be able to be received by CAT subscribers, if the non-duplication rules are enforced again Petitioner and that only Invervenor's (KVOS-TV's) com mercials will be viewed by CATV subscribers when th same programs are being shown by KVOS-TV and by on or the other Seattle TV stations involved.

The Commission's policy in not permitting the comme cials from KING-TV or KIRO-TV from being received

Port Angeles conflicts with the antitrust laws of the United States and with the Commission's own policies, as evidenced in Public Notice B of the FCC, dated February 28, 1968, and attached hereto as Appendix F.

The only difference is that in the case discussed in Appendix F hereto, the radio station was conspiring with local automobile dealers to keep the advertising of distant stations out of the community, while the FCC in this case is in a like position with Intervenor, KVOS-TV, in keeping the distant television stations advertising from coming into the community, if the local station (KVOS-TV) requests this to be done.

The Court's attention is called to the fact that it is the request from the television station tha triggers the requirement that the CATV system does not carry certain programs, including the advertising from the distant television stations, not a finding by the Commission that this is required in the public interest.

If the local television station does not request the application of the rule, then the CATV system can do what it wishes and apparently the "public interest" factor vanishes into thin air. This requirement is in violation of the antitrust laws of the United States[64] which are made expressly applicable to "interstate or foreign radio communications" by Section 313 of the Communications Act.

I. THE COMMISSION CANNOT IMPOSE UPON A NON-LICENSEE THE RESTRICTIONS IMPOSED UPON ITS LICENSEES AND DENY TO A CATV OPERATOR THE PROCEDURAL PROTECTION AFFORDED TO LICENSEES UNDER THE COMMUNICATIONS ACT

Part I of this Argument establishes that the Commission has relied erroneously upon certain irrelevant provisions of the Communications Act to extend its jurisdiction over CATV systems without statutory authority.

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[64] The Sherman Act, 15 U.S.C. Secs. 1 & 2.

Under the *Second Report*, the Federal Communications Commission assumed jurisdiction to regulate the CATV industry under the Communications Act of 1934:

> "Authority for adoption of these rules is contained in Sections 1, 4(i), 303, 307(b), 308 and 309 of the Communications Act. We wish to stress particularly the provisions of Section 1 that the general purpose of the Act is to 'maintain the control of the United States over all the channels of interstate and foreign radio transmission . . . under licenses granted by federal authority; of Section 303(h), 'to establish areas or zones to be served by any station'; of Section 307(b), to make 'a fair efficient and equitable distribution of radio service' among the several states and communities; of Section 303(g), to study new uses of radio and generally encourage the larger and more effective use of radio in the public interest, and Section 303(s), the 'all-channel receiver' section."

Under Section 309(e) of the Communications Act of 1934, as amended,[65] in any application for authority addressed to the FCC in which a substantial and material question arises, the application must be formally designated for hearing. This procedure is applicable to all licensees. Upon assumption of jurisdiction to regulate the CATV industry the FCC has inferentially equated operators of CATV with licensees and as such CATV operators must be accorded the same procedural protection as licensees. It would certainly be violative of due process to impose upon CATV operators the operating restrictions imposed upon licensees while simultaneously denying them the procedural protections of Section 309(e) of the Communications Act because they are not licensees. Moreover, it is quite clear that CATV operators are not licensees under the Communications Act of 1934, as amended, and the FCC does not so regard them. However, the FCC cannot control a non-licensee without providing the non-licensee

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[65] 47 U.S.C. 309(e).

rtain fundamental procedural protections including the ourtesy of considering the evidence submitted.

In denying a Petition for Waiver of the CATV Rules of te FCC without evidentiary hearing as to the substantial isues of fact presented, Petitioner has been denied due rocess of law required by the Fifth Amendment.

The action of the FCC in denying an application for aiver filed by an operator of a CATV system without hear-ig when substantial issues of fact are involved, is an abitrary and capricious action contrary to the public iterest. Under the Administrative Procedure Act, as aended, 60 Stat. 237, 5 U.S.C. 706(2)(a), this reviewing ehrt is empowered to set aside agency actions, findings ad conclusions found to be arbitrary and capricious.

The Commission's CATV rules specifically deny the r ht to a full evidentiary hearing to either petitioner or oponent whether substantial or material questions of fat are raised or not, unless the Commission on its own n tion determines to set the Petition for hearing.[66] The Cmmission establishes itself as both trier of fact and of la—which it may do, but it may not do this through tl expedient of denying the right to cross-examine the oponents evidence merely because such a process creates a simpler and more expeditious procedure.[67]

The plain fact of the matter is that the Courts, as a mtter of fundamental due process, will not permit restraint on a party's property rights without the prior hearing and pticularly where freedom of speech may be affected adersely. *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (164). In the cited case, the Supreme Court ruled that a eizure order against allegedly obscene books was con-

[66] 47 C.F.R. § 74.1109(f). Appendix A herein.

[67] *National Broadcasting Co.* v. *FCC*, 362 F. 2d 946 (D.C. Cir. 1966; *America Broadcasting Co.* v. *FCC*, 179 F. 2d 437 (D.C. Cir. 1950).

stitutionally deficient in not first allowing the distributo
of said books an adversary hearing. Surely, if a restrai
against allegedly obscene books cannot be issued witho
prior hearing, then *a fortiori,* the Commission's flagrant
tempt to restrict the carriage of television signals and
resultant diversified programs of entertainment, news,
litical broadcast, and education materials must be dismiss
Even apart from fundamental First Amendment cons
erations, the property rights of Petitioners must be p
tected under elementary principles of due process as
forth in the Fifth Amendment.

CONCLUSION

For the foregoing reasons, it is urged that the Co
set aside, vacate, annul and determine to be errone
and invalid the *Second Report and Order* and the s
Order of the Federal Communications Commission deny
Petitioner a waiver of Section 74.1103 of its Rules
Regulations (Appendix A herein).

If the Court finds that the Commission has jurisdict
over CATV systems, that the Court suspend the *Sec*
Report and Order and order the Commission to reopen
proceedings to obtain evidence, if available, in orde
make a finding of adverse economic impact by CA
systems on television broadcast stations to the extent
injuring the public interest before putting its Rules
Regulations thereunder into effect or that it make s
a finding of adverse economic impact on a case by
basis upon substantial evidence of record before depri
the public of the programs of television stations.

At the very least, that the Court remand the ins
proceeding to the Commission with directions to desig

the proceeding for a full evidentiary hearing of the substantive issues of fact involved.

To grant such other relief as to this Honorable Court may seem just and proper.

Respectfully submitted,

PORT ANGELES TELECABLE, INC.

By /s/ E. STRATFORD SMITH
E. Stratford Smith

By /s/ ROBERT D. L'HEUREUX
Robert D. L'Heureux

April 24, 1968

CERTIFICATE

We certify that in connection with the preparation of this Brief, we have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

/s/ E. STRATFORD SMITH
E. Stratford Smith

/s/ ROBERT D. L'HEUREUX
Robert D. L'Heureux

Attorneys

APPENDIX

APPENDIX A

Rules and Regulations of the Federal Communications Commission

§ 74.1103 Requirement relating to distribution of television signals by community antenna television systems. [47 C.F.R. 74:1103]

No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcasts and 100 watt or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station;

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations, within whose Grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational television translator stations operating in the community of the system with 100 watt or higher power.

(b) *Exceptions.* Notwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programming is substantially duplicated by one or more stations of higher priority, and

(ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educationa station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry al such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the Grade B or higher priority contour of a station carried on the system whose programming is substantially duplicated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100 watt or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and non-cable reception unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as it's broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least eight days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section,

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available

for reception by subscribers, at any time, less than th programs of two networks (including those broadcast b any stations whose signals are being carried and whos program exclusively is being protected pursuant to th requirements of this section);

(2) The system need not delete reception of a netwo program which is scheduled by the network between t hours of 6 and 11 p.m., Eastern Time, but is broadcast b the station requesting deletion, in whole or in part, ou side of the period which would normally be considere prime time for network programming in the time zo involved;

(3) The system need not delete reception of any pr gram consisting of the broadcast coverage of a speech other event as to which the time of presentation is special significance, except where the program is bei simultaneously broadcast by a station entitled to progra exclusivity; and

(4) The system need not delete reception of any pr gram which would be carried on the system in color b will be broadcast in black and white by the station reque ing deletion.

§ 74.1109 Procedures applicable to petitions f waiver of the rules, additional or different requi ments and rulings on complaints or disputes. [47 C.F 74:1109]

(a) Upon petition by a CATV system, an applicant, p mittee, or licensee of a television broadcast, transla or microwave relay station, or by any other interested p son, the Commission may waive any provision of the ru relating to the distribution of television broadcast sign by CATV systems, impose additional or different requi ments, or issue a ruling on a complaint or disputed questi

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c) (1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The Commission will expedite its consideration of the question of temporary relief.

APPENDIX B

Opinion of Commissioner Loevinger Concurring in Part and Dissenting in Part in Dockets Nos. 14895, 15233, and 15971

The Commission is issuing today a report and order, a notice of inquiry and of proposed rulemaking, a memorandum on jurisdiction and the text of new rules all of which relate to the problems posed by community antenna television systems, commonly referred to as CATV's. These documents aggregate over 120 pages and set forth such a mass of detail that the outlines of the problems, as well as the basic issues, are somewhat obscured, if not wholly submerged. Accordingly, it seems worth while to restate very briefly and simply what the problems and the issues are, in order to indicate my points of agreement and disagreement with the majority.

A CATV is a system comprising an antenna for receiving television signals, and cables and auxiliary apparatus (such as amplifiers) for carrying the signals received into a number of receiving sets. CATV's are about as old as commercial television itself, the first systems having been started as early as 1950. CATV's have been developed in order to fill the wants of those who either because of distance or terrain were unable to get television signals off the air in satisfactory quality or numbers. (See articles in Television Magazine, June 1962, September 1964, and April 1965.)

For a variety of reasons, some of them related to actions of the FCC, the commercial CATV business has developed through independent companies which transmit or relay the signals and other companies which distribute the signals to subscribers. Typically there will be an antenna on some high point near a community which receives the signals of a number of TV stations. These signals will be transmitted either by microwave relay or by coaxial cable to a point in the settled part of the community. At this point the relay company will deliver the signals to the

CATV operating company. The latter will maintain and operate the system which distributes the signals over wires to the homes of subscribers within the community. In some cases the relay company will deliver signals to several CATV companies.

CATV's were started in mountainous areas of Pennsylvania and Oregon where television reception was either poor or nonexistent for many communities. As it appeared that CATV's were able to bring good reception and offer a variety of services to communities far outside the major metropolitan centers, the companies spread to more communities and got more subscribers. Over the years, as television has grown in both numbers of broadcasting stations and numbers of homes, CATV has also grown, although by no means in proportion. In rough figures there are now about 566 television stations in the United States covering some 266 markets (Television Magazine, April 1965, p. 85). Over 52 million U.S. households have television receivers, which is 92 percent of all of the U.S. households. The CATV industry today has about 1,300 operating systems serving about 1.2 million homes (Seiden report to the FFC, p. 1). CATV's are concentrated largely in one- or two-station markets. Most systems are fairly small in size, about 90 percent having fewer than 3,000 subscribers and the average having about 655 subscribers. Most CATV's deliver five signals to their subscribers although some deliver as few as three and some as many as seven or more. However, the number and size of CATV's is growing and CATV systems are being offered to more communities, and to larger communities.

The proliferation of CATV's is regarded by many in the television business as an economic threat. It is said that while the broadcaster has the burden and expense of providing programming which the audience gets without payment and which must be supported by advertising, the CATV operator simply delivers the broadcasters' programing to subscribers and receives payment from them

This is said to constitute unfair competition. It is also alleged that the competition is not only unfair but destructive in some situations, because CATV's deliver the signals of far-distant stations and deliver a relatively large number of signals to relatively small communities in which the audience is not large enough to support a number of stations. CATV's create the anomaly that some relatively small towns are provided with a greater choice of television programing over the local CATV than many larger cities have in the absence of CATV.

These circumstances have created a demand by many broadcasters for the FCC to take jurisdiction over CATV's and to institute measures to protect television broadcasters against competition of CATV's. As will be pointed out in some detail below, the FCC has instituted several proceedings and investigations relating to this matter. However, heretofore it has not taken any definitive action of general significance. While there has been some question as to the extent of the FCC jurisdiction, the Commission has had undisputed jurisdiction with respect to licensing microwave transmitting facilities for those relay companies that carry TV signals by microwave. The manner of exercising that jurisdiction is one of the matters that has been bitterly disputed and that is involved in the present proceedings.

By the documents which the Commission is now promulgating it adopts a series of measures which represent the conclusion of the Commission majority as to the action that the Commission should take in this field. There are four significant measures involved:

> First, the Commission rules that CATV's must carry the signals of all local television stations without material degradation. The Commission exercises power over the CATV's by requiring licensed microwave relay companies to require their customers to comply with the Commission conditions.

Second, the Commission rules that the relay companies must require the CATV's which they serve to avoid the delivery to their customers of the television signals of any programs which duplicate the program of any local station. This rule of nonduplication does not refer merely to simultaneous duplication, but requires CATV's to avoid presenting any duplicate program either 15 days before or 15 days after the date of broadcast by a local station. Thus, this rule provides that the CATV's served by the relay companies subject to the rule must avoid duplication of any local TV program for a period of 30 days.

Third, the Commission asserts jurisdiction over all CATV relay companies and systems, including those that are wholly intrastate and that transmit signals entirely by wire. Although this conclusion is called tentative, the background demonstrates that there is no practical possibility of dissuading the Commission from this conclusion. The Commission gives notice that the substantive measures already adopted will be extended to the full limits of this asserted jurisdiction as soon as the procedural amenities can be completed.

Fourth, the Commission institutes an "inquiry" seeking further comment on more than a dozen and a half questions, all of them relating to the possibility of imposing further restrictions upon the operations of CATV's.

It seems to me that in its approach to the CATV problem the Commission is doing the wrong thing for the wrong reason in the wrong manner to deal with the wrong problem. It is thereby erecting only a gossamer barrier against the evils which it fears.

The Commission is doing the wrong thing when it seeks to control, directly or indirectly, the specific programs which shall be presented to the audience. The Commission

is acting for the wrong reason because it seeks only to limit competition. The Commission is proceeding in the wrong manner because it is acting to extend its jurisdiction beyond statutory language and contrary to precedent. The Commission is dealing with the wrong problem because it concentrates attention only on the single matter of competition for listener attention and substantially disregards more important and more basic problems. Finally, the Commission is erecting only a gossamer barrier against feared evils because the actions taken and proposed are not only wrong but must ultimately prove to be ineffective. Assuming that the Commission will assert jurisdiction over all CATV companies, and will impose nonduplication rules, and disregarding the risk that the action will be set aside for lack of jurisdiction, at best these rules will give slight and marginal protection against competition, and at worst they will be wholly overturned on the whim of some future Commissioner. This is not a sound basis on which to build an industry.

Basically I concur in two of the four rulings made by the Commission today and dissent from two of the four. I agree that the Commission should, within the scope of its jurisdiction, require CATV carriage of local television stations without degradation, and that it should implement the rule so as to insure its effectiveness. I have no disagreement with the substance of the rules regarding carriage of local stations. I also agree that the Commission should undertake an inquiry into the role and scope of CATV's, although I have some reservations as to the inquiry now initiated by the Commission. I disagree with the nonduplication rule which I believe is an improper attempt to limit competition by controlling programing; and I disagree with the Commission's attempt to extend its jurisdiction without congressional authorization.

While I heartily agree that the Commission should conduct a sweeping inquiry into the role and scope of CATV's

in the field of mass communications, it seems to me tha the present inquiry is too little and too late. It is too littl because it does not deal with fundamentals. Many of th important issues in the field are mentioned in the notic of inquiry, but they are scattered through the somewha diffuse discussion in random fashion, even occurring i footnotes. But the basic issues are not mentioned. Thes are what the function of CATV's should be, and what ulti mate mode and system can be developed or encourage to provide the greatest service to the greatest number. I various paragraphs of the instant orders and opinion CATV's are discussed as being ancillary or subsidiary fa cilities to broadcasting and as being a service competitiv with broadcasting. These concepts seem inconsistent t me, and differing regulatory consequences flow from then For example, if the services are truly competitive, the there is some reason to prohibit or discourage joint owne ship of broadcasting facilities and CATV's. On the othe hand, if the services are ancillary, then that reason doe not exist, and broadcasters should be permitted, and pe haps encouraged, to own CATV's. At the present time th Commission is deferring action on a large number of broa cast license renewals because the licensees also own CAT facilities. This action seems inconsistent with some of th positions adopted in these proceedings.

In any event, the present inquiry is too late because th Commission has already formed its opinion on this subje I believe the Commission should make its investigatio and conduct its inquiry before reaching its conclusion rather than afterward. The documents issued today plain show that the Commission and its staff have strong an fixed views regarding the subordinate place of CATV in the mass communications system, and these views a not likely to be much influenced by anything that can b presented to the Commission in the course of the inquir Even if some Commissioners hold such views, it wou seem to me to be more courteous, more productive an

more wise to refrain from officially promulgating them until he formal "inquiry" has been completed.

In any event, I cannot agree that it is proper for the FCC to determine, either directly or indirectly, which programs shall be carried by a CATV system. It seems to me that the basic issue is whether the Commission should employ economic and engineering rules in order to achieve economic and engineering objectives, or should exert direct control over the substance of programing in an effort to achieve its objectives. The method of selective program control, which the majority adopts here, will beget future problems and more control. Problems will arise because of delay, changes in plans for broadcasting of particular programs, the requirements of section 315 and "fairness," and section 317, and other provisions, to pose only a few examples that can readily be foreseen of the numerous problems likely to arise under this rule. Suppose that a local station advises a CATV that the latter cannot carry some program because the station intends to carry it, and then the station, for whatever reason, does not carry the program? As a practical matter, the CATV will not have any other opportunity to carry the program once the date of its broadcast has passed. Will the FCC then require the local station to carry this program? Will that depend upon the Commission's determination of the value of the particular program? We know from experience that documentary and political programs are those most likely to be delayed or omitted. Will the Commission permit these programs to be taken off the CATV at the whim of the local station owner without insuring that he does carry them? It seems unlikely to me that the majority will be willing to do this. However, I doubt that those broadcasters who now clamor for a Commission rule on nonduplication will welcome this new grounds for Commission regulation of their programing.

Even more provocative questions are posed with respect to political programing. Support a distant station, carried

on a local CATV, is carrying a series of political program on a presidential election which is balanced as between th major parties. A local station decides to carry those ne work programs presenting the views of one of the tw major parties. It notifies the CATV which then blank out these programs on its circuits. The local station wi then have to balance out its own programing by presentin the views of the other major party over its broadcastin facilities. But the programs of the distant station carrie on the local CATV will be unbalanced since they will prese only the programs presenting the views of one party. Mo important, the local public will then have an unbalance presentation since it will have the programs favoring o party presented over two stations on the local syste whereas the programs favoring the other party will b presented over only one of the local channels and the will be only half as many of the latter. This is obvious a device that could easily be used to give the public a ve biased political presentation during a campaign. Is t FCC then going to supervise CATV systems to see th their programs comply with all of the requirements section 315 and "fairness"? How will this be accomplishe Will the FCC require program origination by CATV These and a host of other problems flow directly and i evitably from the approach adopted here. To say that a single situation is unlikely is not an adequate respon The records of the FCC and its own attempts to influen programing are eloquent testimony that situations such those suggested, and others more bizarre and unusu do occur and recur.

It should be noted that the rules now adopted by t Commission are based, in significant part, upon its co cern for the preservation of "local live" programing, a that the notice of inquiry suggests that the protection wh the Commission is now bestowing upon broadcasting s tions is likely to be "accompanied by a concomitant du on the part of the station" to provide "local live" p

raming. (See notice of inquiry, par. 53.) Thus, the non-
uplication rule is not only a direct intrusion into the pro-
raming area through control of CATV's, but is also
nother argument to buttress the case for further Com-
ission control of the programing of broadcasters. Believ-
ng, as I do, that the Commission should not seek to control
rogram content in the field of broadcasting, I am opposed
) this approach. See separate opinions in *Lee Roy Mc-
lourry,* 2 R.R.2d 895 (1964); *George E. Borst el al.,* FCC
5-207 (1965); The Role of Law in Broadcasting, 7 J. of
desting. 113 (1964); Religious Liberty and Broadcasting,
3 Geo. Wash. L.R. (March 1965).

One practical factor that seems to be left out of considera-
on in the adoption of a nonduplication rule is that this is
ie approach which is most likely to provide incentive, if
)t virtual necessity, for CATV's to undertake the origina-
on of their own programs. The operation of the nondu-
lication rule means that the CATV operators are required
) delete material from the programs which they receive
id deliver to subscribers and it also means that when
ich material is deleted the CATV is left with a vacant
iannel. While the economic pressures and motivations
ill undoubtedly vary from situation to situation, this kind
' situation provides both the opportunity and incentive
)r program origination; and therefore, in the long run,
likely to engender more competition for the local tele-
sion stations than it avoids. It seems to me to be far
ore simple and effective, not to mention wise and ap-
ropriate, to require that CATV's shall carry local stations,
iat they shall not alter or degrade the signals that they
irry and that they shall meet such other engineering re-
iirements as may be found appropriate, and to leave de-
rmination of programing to the broadcasters without
)rcing the CATV operators into the area of program selec-
on and encouraging them to enter the area of program
rigination.

The most important and fundamental legal objection t the present Commission action is its lack of adequate juris dictional basis. The rule promulgated by the Commissio at this time undertakes to regulate the programs that ma be carried by CATV's by requiring common carriers tha serve the CATV's to impose upon their customers, as condition of service, the limitations contained in the Com mission rules. The Commission has repeatedly rejected thi basis of jurisdiction in the past, as appears from the case cited and quoted below. But regardless of lack of suppo in precedent or statutory language, the logical implicatio of this approach should warn of its unsoundness. If th Commission can impose its will on a person or busines entity, that is the customer of a common carrier, by th simple device of requiring the common carrier to act a the Commission's policeman in order to keep its licens then the Commission can regulate any business in th United States. Every business and most citizens are cu tomers of the telephone and telegraph companies. It ha never previously been suggested that this fact subjecte them to regulation by the FCC. But if today's decisio stands, then that is the law. The Commission need n longer be constrained by any technical limitations on i jurisdiction arising from statutes enacted by Congress, this theory is sustained by the courts. The rule adopte by the Commission today applies to CATV's served b the telephone company as well as to those served by CAT relay companies. But there is nothing in the logic of th Commission's jurisdictional approach that limits this tec nique to CATV's. If this jurisdictional foundation is sou for CATV's, the Commission may, by precisely the sam technique, impose its regulations on theaters or new papers, on stockbrokers or taxicabs, indeed on any bus ness or person that needs and uses the services of a co munications common carrier.

The Commission's assertion of direct jurisdiction ov companies that receive broadcast signals and transm

iem wholly by wire within a single State, without any)ecific statutory foundation, is equally alarming in its ıplications. The principal argument urged in support of e Commission's jurisdiction over such companies is that is desirable for the FCC to have such jurisdiction in der to attain the broad general objectives of the Comunications Act. However, if this reasoning is sound, then e jurisdiction of the Commission is literally unlimited. here is scarcely any aspect of organized social living that il not in some way related to the complex ramifications of e communications system that is now under the jurisdicon of the Commission. If the Commission has authority deal with any activities which "threaten to impede reızation of the Commission's * * * plan and policies" (memdandum on jurisdiction) then it can control all amusents, the field of journalism, the scheduling of movements trains, planes, and ships, not to mention almost any ıer activity that is either competitive or ancillary to or a important user of communications. Such vague and oad reasoning simply will not sustain jurisdiction as to ativities not plainly within the scope of some more specific atutory language. See *F.P.C.* v. *Panhandle Co.,* 337 U.S. 43 (1949).

When the Communications Act itself is examined it is fınd that not only is language lacking to give the Comıssion jurisdiction which it undertakes to assert here but e language of the statute expressly denies that jurisdicn.

Section 1 of the act, 47 U.S.C. 151, states the purpose o the act in most general terms and states that the FCC is created pursuant to this purpose. However, it does not dfine or confer any jurisdiction.

Section 2 of the act, 47 U.S.C. 152, says in its first subdvision that "the provisions of this chapter shall apply t all interstate and foreign communication by wire or rdio * * *." It does not state that the Commission has

jurisdiction over all such communication. Rather it d
scribes in general terms the scope of the act and the ou
ermost limitations of its application. However, it says th
within these outermost limits the act applies pursuant
its provisions. In other words, in order to find jurisdicti
within the scope described by the first subdivision of se
tion 2, it is necessary to find some specific provision of t
act conferring jurisdiction.

This is emphasized by the second subdivision of se
tion 2, which specifically says that nothing in the act sh
be construed to give the Commission jurisdiction wi
respect to "intrastate communication service by wire o
radio of any carrier" or "any carrier engaged in interst
or foreign communication solely through connection w
radio, * * * with facilities located in an adjoining St
* * * of another carrier * * *." It would seem that the l
ter clauses specifically exclude both CATV relay compan
and CATV's from the jurisdiction of the Commission wh
they do not use microwave. However, it is argued that t
intrastate relay companies using wire, rather than mic
wave, are connected by radio with *broadcasters* in anoth
State rather than with *carriers* in another State. The o
vious answer is that at the time of enactment of the Co
munications Act such things as CATV's were unheard o
and that the intent of Congress expressed in the secon
subdivision of section 2 is to deny the Commission juri
diction over intrastate carriers which are not part of a
single integrated system and which simply carry signa
emanating from another State. The congressional intent
to exclude the Commission from regulation of intrasta
facilities and operations is indicated in a number of pr
visions in the Communications Act. In addition to the r
strictions of 47 U.S.C. 152(2), a statutory denial of Co
mission jurisdiction to regulate intrastate facilities or
operations appears in 47 U.S.C. 214 as to communicati
common carriers, in 47 U.S.C. 221(b) as to telephone co
panies, and even in 47 U.S.C. 301(d) as to radio sig

which do not have a direct effect on interstate communications.

However, it is not necessary to rely upon inferential construction. Examination of the entire Communications Act for a specific provision applicable to companies engaged in transmitting signals intrastate by wire discloses that only section 214, 47 U.S.C. 214, is applicable. This section provides that no carrier shall construct or operate a line without obtaining authority from the Commission provided, however, that no authority from the Commission is required for the construction or operation of "a line within a single State unless such line constitutes part of an interstate line." The section further provides that, "As used in this section the term 'line' means any channel of communication established by the use of appropriate equipment other than a channel of communication established by the interconnection of two or more existing channels * *." Thus, by specific statutory provision, the mere fact that a CATV system or relay company is connected by radio to some other communications facility does not constitute its lines a part of a channel of communication comprising both the out-of-State facility and the intrastate facility. The company which operates by wire within a single State is, therefore, specifically excluded from Commission jurisdiction by section 214. By familiar rules of statutory construction such a specific and explicit exclusion prevails over any inference that might otherwise be spun out of more general language that is claimed to imply jurisdiction.

The Commission memorandum on jurisdiction argues from the definitions of "wire communication" and "radio communication" in 47 U.S.C. 153, to the conclusion that the Commission has jurisdiction over CATV's because their activities may be said to come within the scope of these definitions. This argument is wholly beside the point. The section on definitions confers no jurisdiction at all. Many

terms are defined in that same section, including the ter
"United States," "person" and "State commission." It
obvious that the FCC does not have jurisdiction over t
United States, over State commissions or over all perso
The terms defined have legal significance only to the e
tent that they are used in other sections of the statut
But one will search the act in vain for any section wh
expressly confers jurisdiction upon the Commission in t
broad terms mentioned in the memorandum on jurisdicti
Consequently, the definitions given those terms are n
germane to the issue.

If the argument in the Commission's memorandum s
correct, then the Commission has jurisdiction not only o
intrastate wire relay systems and CATV operating syste
but also over television and radio receivers. The ar
ment made in the Commission memorandum is that a
instrumentality which is incidental to or used in the pr
ess of transmitting picture or sound or which forms a co
necting link in the chain of communication between
transmitting station and the viewing public is subject o
Commission jurisdiction. Television and radio receiv
sets are just as much within this jurisdictional concept s
CATV's and broadcasting stations. In that event the "
channel law" (Public Law 87-529, 47 U.S.C. 303(s)
unnecessary as the Commission had full authority to re
late and license receivers by the terms of the original C
munications Act. Clearly, neither the Commission nor
courts have ever previously thought this to be the c e.
Both have continuously acted on the contrary assumptio

The Commission itself has explicitly denied its righ to
control and its jurisdiction over CATV's in several e
cisions which up to the present time have not been spe f-
ically reconsidered or overruled. The first reported e
cision is *Intermountain Microwave,* 24 FCC 54, ado ed
January 30, 1958. In this case, a television broadca r,
Hill County, objected to the grant of a microwave u

ıority to a CATV relay company. The Commission opinion ıid:

> Hill County is seeking to have the Commission deny a radio authorization to a communications common carrier because the communication circuit to be derived under such authorization will be utilized by subscribers who are competitors of Hill County in endeavoring to provide visual entertainment * * *. We are of the opinion that the request of Hill County must be denied. * * * In considering this problem, it must be remembered that it is possible and feasible for communications common carriers to provide program relay facilities to subscribers where no special authorization is required from this Commission, e.g., where the carrier already has in place properly authorized general cable, wire, or radio facilities which may be put to such particular use in the ordinary course of business. Thus, to single out for special consideration and denial only those situations where new construction is involved, where such new construction is specifically for the purpose of providing a service to the public, when the initial or sole user availing himself of service is a community television distribution system, would be arbitrary, capricious, and discriminatory. An alternative, of course, would be to adopt an overall policy, rule, or condition with respect to every cable, wire, or radio authorization, issued by this Commission to carriers under its jurisdiction, under both title II and III of the Communications Act, prohibiting the rendition of the specific type of service here under attack by the objectors. Such a procedure would be equally arbitrary, capricious, and discriminatory and unwarranted in view of our ultimate determination herein.

A few months later, in *Frontier Broadcasting Co.*, 24 FCC 2[illegible], 16 R.R. 1005 (1958) the Commission specifically

pointed out that even if it held CATV systems to be com
mon carriers they would come within the scope of sectio
214 of the Communications Act and, therefore, would nc
require Commission authority to construct or operate ir
trastate lines. The Commission further said that whe
CATV systems transmitting signals by wire do not em
excessive radiation they involve no radio transmissio
which requires any form of license from the Commissic
under the act.

Thereafter the Commission conducted an extensive in
quiry and after plenary proceedings entered a report an
order considering the whole subject of CATV and r
peater service, 26 FCC 403, 18 R.R. 1573 (1959). The fc
lowing are some of the conclusions then reached and state
by the Commission:

> * * * we find no present basis for asserting juri
> diction or authority over CATV's except as we a
> ready regulate them under part 15 of our rules wi
> respect to their radiation of energy. (Par. 71.)
>
> * * * it would *not* constitute a legally valid exerci
> of regulatory jurisdiction over common carriers
> deny authorization for common carrier microwav
> wire, or cable transmission of television programs
> CATV systems on the ground that such facilities wou
> abet the creation of adverse competitive impact
> the CATV on the construction or successful operati
> of local or nearby stations. (Par. 77.)
>
> Certainly, with respect to anything more than t
> barring of simultaneous duplication, we believe th
> to be an unwarranted invasion of viewers' rights
> get "live" programing if they are willing to pay f
> it. The suggested rules restricting presentation of t
> programs of the local station's network would appe
> to be cumbersome, if not completely unworkable, -
> pecially considering that many stations in small m
> kets, including some of those covered in the reco

present programs of two or even three networks. (Par. 96.)

We have considered herein the problem, the issues raised, and suggested methods of solution. Two of the broadcasters' suggestions, both relating to CATV's, we adopt. These are that CATV systems should be required to obtain the consent of the stations whose signals they transmit and that they should be required to carry the signal of the local station (without degrading it) if the local station so requests. *Since both of these steps require changes in the Communications Act,* we will shortly recommend to Congress appropriate legislation, as indicated above. (Par. 99; emphasis added.)

In 1962 the Commission, with one dissent and one abstention, issued the *Carter Mountain* decision, which is the principal reliance of those who now argue for FCC jurisdiction in this matter. *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962). In this case a CATV relay company applied for authority to transmit television signals by microwave to a small community with one local television station. The television station protested the application and a hearing was held. On the basis of a complete evidentiary record the Commission found that a grant of the microwave authority to the relay company with the bringing of CATV service to the community would result in the demise of the local television station. It, therefore, found that a grant of the microwave authority would not be in the public interest. The Commission stated that the two basic issues in the case were whether the relay company was a bona fide common carrier and whether the economic impact of the grant was of legal significance or the public interest was inherent in the fact that applicant was a common carrier. The Commission held that economic impact of the proposed grant on the broadcasting station was of legal significance and was adequate ground for denying the authority sought. The holding was

explicitly limited to this. The Commission said in its opinion: "There is no attempt to examine, limit, or interfere with the actual material to be transmitted. We are merely considering the question of whether the use of the facility is in the public interest, a conclusion which must be reached prior to the issuance of the grant." The Commission did not consider or discuss the decisions cited above and the only comment in *Carter Mountain* on the earlier decisions is this: "To the extent that this decision departs from our views in the report and order in docket No. 12443, 26 FCC 403 (released April 14, 1959), those views are modified."

The decision was appealed and affirmed by the court of appeals. In the Court of appeals, six issues were agreed upon between the parties and submitted to the court by stipulation. These are set forth in the appellate opinion. *Carter Mountain Transmission Corp* v. *FCC,* 321 F.2d 359 (C.A.D.C. 1963), cert. den. 375 U.S. 951 (1963). None of the issues related either to the imposition of conditions upon or control over the programs to be carried by the applicant or to the possibility of extending FCC jurisdiction to companies not utilizing radio transmission for the carriage of signals. In fact, the Commission in its brief to the Supreme Court in opposition to certiorari, specifically stated that no question of Commission jurisdiction over CATV's operating by wire was involved in that case. The brief stated "* * * several bills have been introduced in Congress to give the Commission direct authority over CATV's, *a question not involved here,* * * *" (FCC brief, p. 10; emphasis added).

A month after issuing its *Carter Mountain* decision, the Commission issued a unanimous order in *WSTV, Inc.* v. *Fortnightly Corp.* 23 R.R. 184 (1962) in which it relied upon and reaffirmed the holding of the *Frontier Broadcasting* decision, and reiterated that "this Commission [is] without title II jurisdiction over the CATV system." Accordingly, the Commission ordered that the complaint by a broadcaster against a CATV system "is dismissed for

failure to state a cause of action within the jurisdiction of the Commission."

In the report and order adopting rules to be imposed on CATV's through the common carriers which serve them, the Commission merely mentions the matter of jurisdiction in a footnote (footnote 5). This cavalier reference relies entirely on the authority of the *Carter Mountain* case as the legal foundation for jurisdiction to issue the rules. But this reliance is wholly misplaced. The *Carter Mountain* decision held only that the Commission could wholly deny a common carrier application when the sole proposed use of the common carrier was to serve a CATV and such service would, on the facts of record in that case, result in the economic destruction of a local broadcasting station. The issue of Commission authority to impose conditions on or control the character of the signals carried by the relay company, not to mention the customer, was not raised or decided in that case, was not considered by the Commission (see par. 3, 32 FCC 460) and, in fact, was expressly disclaimed by the Commission (par. 8, 32 FCC 462). The Commission did say that its denial of the application was without prejudice to the right of applicant to file a new application when conditions had changed so that the operation of the CATV would not have the impact on the local television station which the record there demonstrated was likely to follow in circumstances prevailing at the time of the decision. However, this is a far cry from a holding that the Commission can impose conditions as to the signals to be carried by the communications carrier or by its customer. As noted in the preceding discussion, the Commission told the Supreme Court in the *Carter Mountain* brief that the issue of FCC jurisdiction over CATV's was *not* involved, and shortly after the *Carter Mountain* decision a unanimous Commission reaffirmed that it did *not* have jurisdiction over the carriage of signals by CATV's. There is no reasoned Commission opinion that considers this issue and concludes that the

Commission does have the jurisdiction actually exercised in the instant report and order. Several Commission opinions hold to the contrary. In these circumstances, the casual disposition of the jurisdictional issue in a footnote seems inadequate at best and irresponsible at worst.

The Commission memorandum cites cases like *American Trucking Assn.* v. *U.S.*, 344 U.S. 298, and *NBC* v. *U.S.*, 319 U.S. 190, to sustain jurisdiction. However, the point at issue in those cases, and others like them, was simply whether a regulatory agency having jurisdiction over a field of activity and an enterprise within that field could act with reference to a particular practice not specified in the basic statute. The Supreme Court held that, regardless of the absence of specific reference to a particular practice in the act, the regulatory agency having jurisdiction of the field and the enterprise might promulgate regulations dealing with a practice which was considered to be an evil requiring correction. The Court points out that the necessity of formulating regulations to meet specific practices not foreseen by Congress is precisely one of the reasons regulatory agencies such as the Commission are created. However, this reasoning has nothing whatever to do with an issue as to the existence of jurisdiction over an economic or technical field or a particular enterprise.

A case much closer to the present situation than any cited in the Commission's memorandum is *F.P.C.* v. *Panhandle Co.*, 337 U.S. 498 (1949). In that case the Supreme Court held that the FPC could not extend its power by the kind of reasoning relied on by the FCC here, even though the FPC was seeking to regulate a company concededly within its general jurisdiction but as to an aspect of the company's business that was not within the terms of the statutory jurisdiction. The Court said, inter alia:

> Nothing in the sections indicates that the power given to the Commission over natural-gas companies by

> section 1(b) could have been intended to swallow all the exceptions of the same section and thus extend the power of the Commission to the constitutional limit of congressional authority over commerce.
>
> Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed. In the light of that history we should not by an extravagant, even if abstractly possible, mode of interpretation push powers granted over transportation and rates so as to include production * * *. We cannot attribute to Congress the intent to grant such far-reaching powers as implied in the act when that body has endeavored to be precise and explicit in defining the limits to the exercise of Federal power.

The Court stated that if the Commission were of the opinion that it should have the power sought, then it was authorized to call the attention of Congress to that fact. The reasoning adopted by the Court in the *Panhandle* case applies with even greater force to the FCC in the instant situation. Here there is not merely an inference from earlier inaction that the Commission did not believe it had the power now asserted. Here there are clear and explicit declarations by this Commission that it does not have the power which the present majority of the Commission now claims. The only thing that has changed since the Commission last disclaimed the jurisdiction it now asserts is the personnel of the Commission. That is not a proper basis for disregarding precedent and changing established legal principles. See my separate opinion in *Assignment of Additional VHF Channel to Johnstown, Pa., etc.*, 1 R.R. 2d 1572, 1580 (1963).

Contrary to the apparent belief of the Commission majority, the fact that it might be thought desirable for the FCC to have control of CATV's or their practices does not indi-

cate that the agency does possess such power. See *Youngstown Co.* v. *Sawyer,* 343 U.S. 579 (1952). Despite some reservations as to the wisdom and objectivity of the Commission and its staff regarding CATV's, I would agree that, as a matter of principle, the FCC should have the authority to regulate CATV's as a service closely related to broadcasting. I favor and will support appropriate congressional legislation to give the Commission jurisdiction in this field.

This position differs from the assertion of jurisdiction made by the Commission in the instant proceedings in several important respects. First, it is founded on a deferential respect for the constitutional scheme by which Congress must specifically delegate power before it is exercised by an agency created by Congress. Second, the power that Congress delegates is almost certainly going to be specified and limited in extent, whereas the power derived by inference from broad general statutory terms is unlimited except by the self-restraint of the Commissioners and the vigilance of the courts. Finally, it is likely that congressional hearings will illuminate this problem and that Congress will provide some guidance to the Commission that may suggest a better course that the one the Commission is now determined to follow.

At least part of the problem that the Commission now foresees in the proliferations of CATV's is the result of the Commission's own past policies. In the past the Commission has adopted the same restrictive attitude toward translators and other auxiliary services that were within its jurisdiction that it now proposes to take toward CATV's. The popular demand which has been responsible for the recent rapid growth of CATV's has been largely the result of the denial of service to many areas because of the FCC strictness and reluctance in granting authority for the construction and operation of translators and boosters. Apparently the Commission has not yet learned that the expansion of service is not to be attained by the limitation of compet

tion and the imposition of rigorous regulation but rather by stimulating competition and moderating regulation. The Commission can do many things to stimulate and encourage the extension and expansion of television service throughout the country, but regulating the programs that can be brought into homes by CATV's and extending the Commission's jurisdiction without specific congressional authority are not likely to help.

However, it seems to me that the most basic and important issue involved here is far more important than the interests of the broadcasters, the CATV's, or even of the audience in securing broadcasting service. The basic issue involved here is whether a great Government agency will show reasonable respect for its own precedents and reasonable restraint in seeking to extend the scope of its own power. Undoubtedly the independent regulatory agencies have been given great power and broad discretion in its exercise. But if democratic government is to survive, the corollary of great power and broad discretion must be a strong impulse of self-restraint in the exercise of such power. In the face of statutory language, the Commission's own precedents, the prior statements of the Commission to the courts and its requests to Congress for legislation on this subject, it seems to me to be presumptuous for the Commission now to assert jurisdiction which it has previously explicitly disclaimed. If the laws are inadequate to cope with the problems of the moment, it is the function of Congress to remedy that lack. There is no reason to assume that Congress is any less responsive than the Commission to the public interest, or that it is unable or unwilling to act if action is needed in this field at this time. I am, accordingly compelled to dissent from the Commission's efforts to extend its jurisdiction without specific congressional authority.

APPENDIX C

Legslative History of Proposed Amendments to the Communications Act, Conferring Jurisdiction over CATV

I

On September 8, 1959, and after lengthy hearings during the 86th Congress, First Session, the Committee on Inter state and Foreign Commerce submitted Senate Report 92 accompanying and recommending passage of Senate Bil 2653, entitled "A bill to amend the Communications Ac of 1934 to establish jurisdiction in the Federal Communi cations Commission over Community Antenna Systems."

The bill provided as follows:

> That section 3 of the Communications Act of 193 (47 U.S.C. 153) is amended by inserting at the en thereof the following: "(hh) 'Community antenna tel vision system' means any facility performing the serv ice of receiving and amplifying the signals transmit ting programs broadcast by one or more television sta tions and redistributing such programs, by wire, t subscribing members of the public, but such term sha not include (1) any such facility which serves fewe than fifty subscribers, (2) any such facility whic serves only the residents of one or more apartmer dwellings under common ownership, control, or mar agement, and commercial establishments located o the premises, or (3) any such facility used only f the distribution, by wire, of programs for which charge is imposed generally on all subscribers wher ever located and which are not in the first instan broadcast for reception without charge by all membe of the public within the direct range of televisio broadcast stations."
>
> Sec. 2. Section 3 (h) of the Communications Act 1934 (47 U.S.C. 153) is amended to read as follows:
>
> "(h) 'Common carrier' or 'carrier' means any pers engaged as a common carrier for hire, in intersta

or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting or in operating a community antenna television system shall not, insofar as such person is so engaged, be deemed a common carrier."

Sec. 3. Title III of the Communications Act of 1934 (47 U.S.C. 301 and the following) is amended by inserting therein a new section 330 as follows, entitled:

"Community Antenna Television Systems

"Sec. 330. (a) No person shall operate a community antenna television system except under and in accordance with this Act and with a license granted under the provisions of this Act: *Provided,* That a community antenna television system which is in operation on the date of the enactment of this section may continue to operate until the Commission issues a license therefor: *Provided further,* That any system continuing to operate in accordance with the foregoing shall, not later than one hundred and twenty days after such enactment, submit an application for a license containing all the information required by the Commission to be submitted with such application.

"(b) (1) The provisions of sections 303, 304, 307, 308, 310, 311, 312, 313, 315 and 316 relating to stations, radio stations, broadcasting stations, licenses therefor, licensees thereof, and station operators shall apply also to community antenna television systems, licenses therefore, licensees thereof, and operators thereof.

"(b) (2) The provisions of section 317 relating to matters broadcast by any radio station, and section 326 relating to radio communications shall be deemed to apply also to all matter distributed to its subscribers by a community antenna television system.

solely in rebroadcasting) which is assigned to a c
munity in which a community antenna television s
tem provides television programs to local subscrib
the Commission may require that such commu
antenna service shall regularly redistribute progra
broadcast by such local television broadcast statio

"(f) (2) The Commission may, by rule or order, p
scribe such standards and conditions as it may
necessary to assure that the reception of the progra
redistributed by the community antenna television s
tem under subsection (1) shall be reasonably com
able in technical quality to the reception of program
other television stations redistributed by the com
nity antenna television system.

"(f) (3) The Commission also may, by rule or or
prescribe the period of time within which commu
antenna television systems shall complete preparat
for and commence the redistribution of programs u
subsections (1) and (2).

"(g) The Commission shall prescribe appropr
rules and regulations in order to avoid the duplica
of programs broadcast or scheduled to be broadcas
a television station (other than a station engaged s
in rebroadcasting) which is assigned to a communit
which a community antenna television system se
subscribers by such community antenna television s
tem redistributing the signals of another television
tion. In promulgating such rules and regulations
Commission shall be guided by the standard set f
in subsection (c) of this section, requiring that
regard be given for the desirability of facilitating
continued operation of a television station which is
viding the only available locally originating televi
broadcast program service."

The committee report explained the purpose of the bill as to place CATV under the jurisdiction of the FCC:

> This bill is designed to amend the Communications Act of 1934 so as to place community antenna television systems (CATV) under the jurisdiction of the Federal Communications Commission and to empower the Commission to issue requisite certificates of public interest, convenience, and necessity for the construction and operation of community antenna television systems. This bill declares CATV systems not to be common carriers and sets forth the sections of title III of the Communication Act affecting regular broadcasters that are to apply to the community antenna television systems.

SRep. No. 923, 86th Cong., 1st Sess. 3 (1959).

The report summarized the Commission's treatment of CATV since its inception and referred to it disclaimer of jurisdiction in *Frontier Broadcasting Co.* v. *Laramie Community TV Co.*, 16 P & F Radio Reg. 1005 (1958):

> The question of the FCC's jurisdiction over community antenna television systems and the type of regulation that should be imposed was raised many years ago. The FCC's files make it clear that this issue was presented to it as early as 1950 and that its staff recommended that it exert authority in this field. But, the Commission has long hesitated over the matter. In speeches by individual commissioners and in testimony before your committee, doubt as to its power has been expressed but no official ruling was made until April 21, 1958, when the FCC decided a long-pending proceeding instituted by a group of small-town broadcasters who asked that the Commission regulate CATV systems as common carriers. (*See Frontier Broadcasting Company* v. *Collier*, 16 R.R. 1005 (April 1958.)) The

> Commission's final action in this matter made it per fectly clear that it did not intend to regulate CAT systems in any way whatsoever. However, on May 2 1958, the FCC instituted an inquiry into the impac of community antenna television systems, televisio translators, television satellite stations, and televisio reflectors upon the orderly development of televisio broadcasting (Docket No. 12443) and included as pa of that proceeding the reconsideration of the abov mentioned *Frontier Broadcasting* case. *Id.* at 5.

After several amendments to the bill were offere S. 2653 was debated on the Senate floor on May 17 ar 18, 1960. Senator Pastore, chairman of the sponsorir committee, was the floor leader and explained that the b was not designed to hurt CATV, but merely place it und regulatory control:

> This bill is not directed in any way toward injurir CATV as such. We seek merely to place CATV sy tems under regulation in order to protect their right and also to protect the rights of the only availab broadcasting station, which may perish and go out existence unless proper reforms are taken now of very moderate nature. 106 Cong. Rec. 10417 (196

Senator Pastore was questioned at length on the purpos of the bill and explained it was a new delegation of authc ity of jurisdiction over CATV. In a brief colloquy, it w stated:

> Mr. Curtis. First, I thank the distinguished Senat for his long efforts in a difficult area. I have giv very limited study to S. 2653. It appears to me th the proposed legislation places the community anten systems under the jurisdiction of the Federal Co munications Commission. To that extent there is delegation of authority to them. Does the bill direc

prohibit or outlaw any act that the community antenna systems are doing now?

Mr. Pastore. I do not think so, aside from the fact that now they are at liberty to take a picture from a broadcasting station in Phoenix and show it in Yuma, for example. It may be earlier than the picture would be shown on the local broadcasting station in Yuma, and if the broadcasting station at Yuma made an application to the FCC, it could bring that to a stop. That would be a deprivation of some activity. That is about as far as it would go.

Mr. Curtis. The bill grants to the Commission the right to look into that situation?

Mr. Pastore. And to make rules and regulations.

Mr. Curtis. To make rules and regulations.

But in the absence of action by the Commission, is there anything in the bill which prohibits what the community antenna systems can do?

Mr. Pastore. I would not say so, unless the Senator sees something in the bill to the contrary. *Id.* at 10425.

n answer to questions by Senator Kerr, an opponent of th bill and of the grant of jurisdiction to the FCC over CATV, Senator Pastore explained that the jurisdictional grnt was necessary to develop an orderly system of TV:

. . . [I]t is necessary to put these people under regulation, so that as new licenses are granted the Federal Communications Commission will have jurisdiction. The FCC then will be in a position to develop an orderly system of TV. However—and this must be borne in mind—insofar as harassment is concerned, or so far as a burden may be incurred, because of the

> duties that are imposed upon a CATV organizatio where there is no problem, I would assume the actio of the Federal Communications Commission would b nothing more than perfunctory. *Id.* at 10426.

The Kerr-Pastore debate demonstrated that the issu before the Senate was whether the FCC was to gain ju isdiction over CATV through the passage of the amen ment—jurisdiction which it admittedly lacked:

> Mr. Kerr. Did it ever occur to the Senator fro Rhode Island that there are hundreds and thousan of American Businesses in operation who are prayin unto the Lord and their Government to protect the by keeping them free of regulation, rather then in posing it on them and then having them depend upon legislative record made on the floor of the Senate whic if someone downtown whose identity we do not kno is controlled by it ,will let them loose after they ha paid a bunch of lawyers in Washington to come dow to get them loose?
>
> The Senator says he cannot write a bill to prote these people. Apparently the Senator does not know h own ability. . . .
>
> . . . .
>
> Mr. Pastore. There was not one representative of CATV who appeared before our committee who did n say that he wanted to be regulated. I call as my chi witness the Senator from Oklahoma [Mr. Monroney who is going to make the motion to recommit the bi As a matter of fact, Senator Monroney introduced bill himself to regulate the entire industry. Howev that bill is only a shell. It does put them under regu tion, but it does not regulate.
>
> Mr. Kerr. Next to not being under it, that is the b shape one can be in. *Ibid.*

Senator Pastore urged that by conferring jurisdiction over CATV, the bill would actually provide protection to CATV systems against exorbitant charges by the broadcast station, should the stations prevail in pending copyright litigation. Senator Kerr countered that the FCC through its present jurisdiction over the broadcasters could protect CATV without extending its jurisdiction to CATV.

Mr. Kerr. Did the Senator from Rhode Island say the Federal Communications Commission, which has control of the station whose signal is being picked up, could not control them without this act?

Mr. Pastore. I did not say that.

Mr. Kerr. That is what the Senator did say.

Mr. Pastore. I said the CATV would not have any right to go before the FCC.

Mr. Kerr. Who says they would not?

Mr. Pastore. I say so.

Mr. Kerr. Who prescribes that?

Mr. Pastore. Because the Senator says they should be put under the CATV. That is just the point.

Mr. Kerr. Cannot a person go into court and ask for justice, without being set aside by the court?

Mr. Pastore. The FCC is not a court. It is a regulatory body. We are trying to put the parties under this body with appropriate procedures.

Mr. Kerr. The Senator wants to make them slaves, without provision for protection of their lives. How silly can one get?

Mr. Pastore. I am not silly. I am talking about jurisdiction.

Mr. Kerr. So am I.

Mr. Pastore. I am talking about jurisdiction, and there is nothing silly in it.

Mr. Kerr. The Federal Communications Commission does not have to be given regulatory control over any citizens to enable those citizens to go before that Federal Communications Commission and file a petition.

> Mr. Pastore. A petition to do what?
>
> Mr. Kerr. To enforce any right that an American citizen has with reference to that Commission's jurisdiction.
>
> Mr. Pastore. The Senator could not be more wrong than he is. *Id.* at 10429-30.

Senator Pastore, the floor manager, insisted that the bill was necessary to confer CATV jurisdiction upon the FCC, and that without it, the Commission was powerless to act.

Regarding the effects of the bill in conferring jurisdiction, Senator Monroney emphasized that it would provide unprecedented economic protection to broadcasters:

> The only test for the granting of a license for a television or a radio station, in the long history of the Federal Communications Act, has been, Is there a frequency available which will not interfere with the frequency assigned to someone else? A hundred television stations could be established if frequencies were available for them. If there is a radio station in Yuma, six stations could be put in if frequencies could be found for them. But we have never contemplated granting economic protection to licensees until this bill was introduced. We are breaking entirely new ground, which will extend in the future to such a point that other people will want to install television in an area, and it will be necessary to provide economic protection for the local single station. I do not think such a policy has ever been established. *Id.* at 10535.

Senator Monroney compared the immunity from FCC regulation of reception and cable distribution by CATV to that enjoyed by the television networks:

> Mr. Long of Louisiana. Does the bill violate the principle that the airways are free and are available to everyone?

Mr. Monroney. I do not think it does. But it violates the principle of not having Federal regulation of cable transmission.

Let me state the best illustration: All of us know that the mightiest force in television, which controls 90 percent of all television programs received by viewers in the United States, are the networks. They are not subject to regulation, and very few Members of Congress would want them to be regulated. Why? Because the concept of the Federal Communications Act is that the networks themselves are not putting anything on the air. They use cables to carry the signals to the local stations. So they are not regulated. So we do not regulate—and I do not think we should—the mighty giant of television which supplies the television diet of 50 million television sets by carrying the television program signals by cable to the viewers.

But if the quite similar CATV systems are to be regulated by means of this bill, we shall be establishing a precedent; and in that event I do not see how we can properly regulate the smallest midget in the industry, but fail to give some consideration to regulating the mighty networks which are carrying signals by means of a similar system, and also without using the airways. *Id.* at 10536.

Senators opposing the amendment recognized that the bill was designed to provide economic protection for television.

Mr. McClellan. The meaning of the word "facilitate," as I understand it, is to make easy or less difficult; to free from difficulty or impediment. In other words, it is to facilitate the execution of a task; to lessen the labor of; to assist; aid. In other words, the station owner could petition the Federal Communication Commission to impose conditions that will facilitate, that

will aid, that will remove any difficulty, that will remove encumbrance or hindrance to the continued operation of that station.

Mr. Monroney. Which would mean limiting competition, which this bill is designed to do, from newly constructed CATV's.

. . . .

Mr. McClellan. In other words, the rules the Commission promulgates must be promulgated to achieve that purpose. That is the proposed law we are considering. I am not saying it is not a good thing, but I think we ought to know what it does. This provision sets up a TV station in a position of preferred consideration, and in a position of preferred considereation in competition with another station. *Id.* at 10537.

Senator Long registered concern over the economic advantage to broadcasters conferred by the bill.

Mr. Long of Louisiana. I am referring to page 4 of the bill, at line 21, where it provides:

A television station * * * may petition the Commission to include in such license such conditions on the community antenna television system's operation as will significantly facilitate the continued operation of a television station which is providing the only available locally originated television broadcast program service.

The thought that occurs to me is that it would seem to go far enough to say that the community antenna system should not impose any undue injury or hardship on the television station. However, to say that it could be required to operate in a manner to facilitate

the continued operation of the competitor and system in his business, is too much to ask.

. . . .

Mr. Long of Louisiana. As the law stands today there is nothing in the law by which the FCC can prevent one television station from driving another one out of business. I have seen that happen in my state, where a VHF station came into the community which had a UHF station, by providing a better signal and better programs. *Id.* at 10541.

Senator Hickenlooper questioned whether the proposed amendment conferring jurisdiction upon the FCC was constitutional.

Mr. Hickenlooper. Mr. President, I merely wish to ask some questions of the Senator from Oklahoma or of another Member of the Senate.

It seems to me that a rather complicated legal situation could arise in this instance. As I understand, a CATV station merely takes something out of the air, and does not put anything into the air.

Mr. Monroney. That is correct.

Mr. Hickenlooper. After it takes something out of the air—just like using the air we breathe—it then wires it, by means of a physical operation, into a house, where it is hooked up to a television set.

Mr. Monroney. That is correct.

Mr. Hickenlooper. What justification is there for having the Federal Government move into that regulatory field? Can it be called interstate commerce? If so, can the Federal Government then regulate my radio set in my house because I take the signal out of the air by means of an aerial erected on top of my house?

> Mr. Monroney. This presents a problem, because many think this is exclusively in the field of interstate commerce. Of course, the ether waves are interstate. But when the signal is taken out of the air and is transmitted to the Senator's house by cable, that is purely intrastate. *Id.* at 10543.

The issue to recommit the bill was plainly and openly acknowledged as an attempt to defeat it.

> Mr. Kerr. Mr. President, I rise in support of the motion to recommit the bill. I do it for the simple reason that I think it is an absolute necessity to protect the well-being and the opportunity for existence of over 760 small businesses. . . . *Id.* at 10544.

The bill was recommitted by a vote of 39 to 38. *Id.* at 10547. A vote to reconsider failed 38 to 36. As a post mortem to the defeat of S. 2653, Senator Moss, a proponent of the bill, asked for further study by Congress as to whether, in view of the bill's failure to pass, appropriate legislation should be enacted to grant the FCC some jurisdiction over CATV in order to protect local television. *Id.* at 11462.

Throughout the lengthy debate, both proponents and opponents assumed that the legislation was necessary in order to confer jurisdiction upon the FCC over CATV. The legislation failed to pass.

II

In the 89th Congress, S. 3017 was introduced on March 4, 1966, 112 Cong. Rec. 4901 (1966). It was entitled "a bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes." The bill provided no regulation

scheme or rules as did S. 2653, 86th Cong., 1st Sess., but merely conferred jurisdiction over CATV upon the FCC. It also barred program origination by CATV, and relegated it to the role of receiving and distributing broadcast signals. This bill was submitted subsequent to the FCC's assumption of jurisdiction and was designed, in the words of its chairman as a confirmation of jurisdiction.

> The Commission has determined that it has jurisdiction over all CATV systems, and it has asserted that jurisdiction to the extent necessary to carry out the announced regulatory program. However, given the importance of CATV, we believe it highly desirable that Congress amend the Communications Act to confirm that jurisdiction and to establish such basic national policy as it deems appropriate.
>
> ....
>
> Of prime importance is the proposed new section 331(a)(1) of the act, which would expressly confer upon the Commission, in broad and comprehensive terms, authority to regulate community antenna systems in the public interest. This authority is to be exercised only to the extent necessary to carry out the purposes of the Communications Act, particularly the establishment and maintenance of broadcast services and the provision of multiple reception services. There is thus a congressional recognition of the public service rendered by the broadcast and CATV industries and a directive to promote the orderly growth of both industries. *Ibid.*

Also, submitted along with the explanatory statement is the dissenting statement of Commissioner Loevinger who adhered to the previous FCC rulings that it had no jurisdiction.

Separate Statement of Commissioner Lee Loevinger Regarding Proposed CATV Legislation

I believe it is necessary for Congress to legislate on the subject of community antenna television and that the draft of proposed legislation submitted herewith by the FCC is the best compromise that can now be agreed upon. It is my opinion that under present statutes the Commission does not have the jurisdiction which it claims over CATV's. See my separate opinion at 4 RR 2d 1679, 1712. If the Commission is to act in this field, legislative authorization is, therefore, necessary.

. . . .

It would be desirable for Congress to establish more specific standards for administrative action than are contained in the proposed bill. But it is appropriate for Congress to delegate broad authority for the Commission to act under whatever standards Congress may see fit to establish.

Accordingly I join in recommending that Congress consider the proposed bill submitted herewith and enact legislation in such form as may best express the congressional view of the proper way to deal with the problems involving FCC jurisdiction to regulate CATV systems, the operation of CATV systems, the relation of CATV systems to conventional broadcasting stations, and the relation between Federal and State jurisdiction in this field. *Id.* at 4902.

The bill, S. 3017, contains the following language:

That section 3 of the Communications Act of 193 (47 U.S.C. 153) is amended by adding at the end ther of a new subsection to read as follows:

"(gg) 'Community antenna system' means any fac ity which, in whole or in part, receives directly or i

directly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service."

Sec. 2. The Communications Act of 1934 is further amended by adding a new section to read as follows, entitled:

"Community Antenna Systems

"Sec. 331. (a) The Commission shall, as the public interest, convenience or necessity requires, have authority:

"(1) to issue orders, make rules and regulations and prescribe such conditions or restrictions with respect to the construction, technical characteristics, and operation of community antenna systems, to the extent necessary to carry out the purposes of this Act, with due regard to both the establishment and maintenance of broadcast service and the provision of multiple reception services;

"(2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

"(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly over the air from a broadcast station, except that the Commission may, upon an express finding that it would serve the public interest, authorize by general rule limited exceptions to permit such transmissions without any additional charge to subscribers.

"(c) Nothing in this Act or any regulation promulgated hereunder shall preclude or supersede legislation

relating to, or regulation of, community antenna systems by or under the authority of any State or Territory, the District of Columbia, the Commonwealth of Puerto Rico or any possession of the United States except to the extent of direct conflict with the provisions of this Act or regulations promulgated hereunder."

III

Again in the 89th Congress a bill was introduced conferring jurisdiction over CATV. H.R. 13286, 89th Cong., 2d Sess. (1966). On June 17, 1966 the House Committee on Interstate and Foreign Commerce issued H.R. Rep. No. 1635, accompanying H.R. 13286, entitled "a bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes." The bill, as amended, provides:

That (a) section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by adding at the end thereof the following new subsection:

"(gg) 'Community antenna system' means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service."

(b) Subsection (h) of such section 3 is amended to read as follows:

"(h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio or in interstate or foreign transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting

or in operating a community antenna system shall not, insofar as the person is so engaged, be deemed a common carrier."

Sec. 2 Part I of title III of the Communications Act of 1934 is amended by adding at the end thereof the following new section:

"Community Antenna Systems

"Sec. 331.(a) The Commission shall, as the public interest, convenience or necessity requires, have authority—

"(1) to issue orders, make rules and regulations, and prescribe such conditions or restrictions with respect to the construction, technical characteristics and operation of community antenna systems, to the extent necessary to carry out the purposes of this Act, with due regard to both the establishment and maintenance of broadcast services and the provisions of multiple reception services; and

"(2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

The Commission shall, in determining the application of any rule or regulation concerning the carriage of local broadcast stations by community antenna systems, give due regard to the avoidance of substantial disruption of the services to subscribers of community antenna systems which were in operation on March 1, 1966, resulting from the limited channel capacity of any such systems.

"(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly

over the air from a broadcast station, except that t
Commission may, upon an express finding that it wo
serve the public interest, authorize by general r
limited exceptions to permit such transmissions wi
out any additional charge to subscribers.

"(c) The Commission shall prescribe such rules a
regulations and issue such orders as may be necess
to require the deletion by community antenna syste
of signals carrying any professional football, baseb
basketball, or hockey contests if, after application
the appropriate league, the Commission finds that
failure to delete such signals would be contrary to
purposes for which the antitrust laws are made
applicable to certain agreements under Public I
87-331.

"(d) Nothing in this Act or any regulation pro
gated under it shall preclude or supersede legisla
relating to, or regulation of, community antenna s
tems by or under the authority of any State, the D
trict of Columbia, the Commonwealth of Puerto R
or any possession of the United States except to
extent of direct conflict with the provisions of this
or regulations promulgated under it." H.R. Rep.
1635, 89th Cong., 2d Sess. 1-2 (1966).

In the purposes of the legislation, the Committee
cautious not to challenge the FCC's already assumed j
diction.

The principal purposes of the legislation are to—

(1) delineate the scope of the authority of the F
eral Communications Commission to regulate C
systems. . . . *Id.* at 2.

The Committee pointed out that although the F
eral Communications Commission had asserted its juris

on over CATV, the Committee would not state a position, xcept to say that the Congress should confer this jurisdic- on.

> In reporting the instant legislation, the committee does not either agree or disagree with the above conclusions. Test cases are pending at present in the courts. Therefore, the question of whether or not and to what extent the Commission has authority under present law to regulate CATV systems is for the courts to decide in such cases.
>
> It is the considered judgment of the committee, however, that in order properly to regulate broadcasting and communications in the United States the Commission should have the broad powers which the instant legislation would confer upon the Commission to regulate CATV systems. *Id.* at 9.

The Commission, in its explanatory note attached to the Committee report, candidly admitted it wished the Congress t confirm jurisdiction which it had assumed.

> The Commission has determined that it has jurisdiction over all CATV systems, and it has asserted that jurisdiction to the extent necessary to carry out the announced regulatory program. However, given the importance of CATV, we believe it highly desirable that Congress amend the Communications Act to confirm that jurisdiction and to establish such basic national policy as it deems appropriate. *Id.* at 16.

Commissioner Loevinger issued a separate statent explaining that although he favored the proposed legislation, he believed it necessary to confer jurisdiction upon the FCC.

> I believe it is necessary for Congress to legislate on the subject of Community Antenna Television and that

> the draft of proposed legislation submitted herewith by the FCC is the best compromise that can now be agreed upon. It is my opinion that under the present statutes the Commission does not have the jurisdiction which it claims over CATV's. See my separate opinion at 4 RR 2d 1679, 1712. If the Commission is to act in this field legislative authorization is, therefore, necessary. *Id.* at 20.

The Department of Justice, in response to a request for its views, was careful not to state an opinion as to whether the FCC had jurisdiction over CATV.

> The principal purpose of the bill is to clarify and confirm the Commission's jurisdiction over community antenna systems in order that the Commission shall have clear authority to integrate community antenna service into the national broadcast structure in such a way as to promote maximum service to everyone, including both those persons who are dependent upon off-the-air service and those who may receive cable service. *Id.* at 21.

The minority report of the Committee did not hesitate to state its position that the Commission lacked jurisdiction over CATV and that the Commission had unlawfully usurped this jurisdiction.

> H.R. 13286 is a bill that was prepared by the Federal Communications Commission and forwarded to the Congress with the request that it be passed. It is not an administration bill. It is an attempt by a Federal agency to force Congress to give it jurisdiction which it heretofore claimed it did not have. The passage of this bill at this time would serve to underwrite an unauthorized assumption of jurisdiction by the Federal Communications Commission; it would

thwart the judicial processes which are presently considering the issues involved; it would create an entire new concept of regulation at the Federal level; it would violate the constitutional guarantees of the first amendment; it would permit a Federal administrative agency (supposedly an arm of the Congress, created by the Congress) to write substantive law by the exercise of rulemaking powers; it would authorize a Federal agency, not answerable to the electorate, to repeal the laws of the several States by rulemaking powers; it would authorize monopolistic practices in the broadcasting of professional sports events and deny millions of people the opportunity of witnessing these events by television; it would create the power of censorship in the Federal Communications Commission insofar as CATV systems are concerned; it would give the Federal Communications Commission the authority in certain areas to determine what a person could or could not receive over his television or radio set—to name a few of the flaws.

Television and radio were not intended to be regulated in the same manner as public utilities. They were subjected to regulation only because of the limited frequencies available in the spectrum. Regulation was for the sole purpose of properly policing the spectrum and seeing that it was not abused. Hence, licenses for broadcasting radio signals were required, because the spectrum was public domain and subject to the police powers of the sovereign.

The history of the Communications Act of 1927 and the amendments thereto of 1934 reflect clearly that the purpose of regulation was to make it possible for the full spectrum to be used in an orderly manner so that broadcast signals would not conflict with each other and thereby create a pandemonium of static which would be of no use to anyone. The operation of the businesses operating under licenses issued by

the Government was to be on the free enterprise base. In other words, it was spelled out in the history that the Government would not have jurisdiction of the economics of the several broadcasters. Whether or not they were able to stay in business or to be successful in their operations was to be determined solely by the traditional free enterprise system upon which this country was built. Many attempts have been made by the Federal Communications Commission to gain economic control over the broadcasters. The most recent attempt was in 1963 when the Commission issued orders limiting the length and frequency of broadcast commercials. The House of Representatives struck down this attempt by the passage of a bill denying them the power to enter the field of economic control.

H.R. 13286 as proposed by the Federal Communications Commission is an attempt to gain economic control over CATV systems and thence to move forward to gain economic control over broadcasters and thereby measurably expand the regulatory powers of the Communications Commission on a Federal basis.

A CATV system is a wired communications system and does not use the spectrum or public domain for broadcasting purposes. Hence, the Commission has heretofore held on several occasions that it did not have jurisdiction of CATV systems as such.

There are three methods by which programs can be received by a CATV system to be transmitted over it wires:

1. The pure off-the-air system. This is the case where a high antenna is employed to catch any broadcast signals that happen to come its way.

2. The microwave-fed system. This is the system where the original broadcast is rebroadcast through the spectrum, one or several times, until it reaches its desired destination. (The FCC has jurisdiction over the microwave facility because it is a rebroad-

cast into the spectrum, but not over the reception facility.)

3. The coaxial cable. This is a system where a coaxial cable is employed from the broadcasting station to the CATV system. If the coaxial cable does not cross a State line, the Federal Communications Commission does not have jurisdiction. If the coaxial cable does cross a State line, the jurisdiction of the FCC attaches under its jurisdiction over an interstate common carrier by wire. However, in this case the jurisdiction of the Commission does not extend to a determination of what can or cannot be carried over the wire.

The present bill is designed to give the Federal Communications Commission absolute control over reception by all three methods. The main objective of the Federal Communications Commission is to gain control over the off-the-air (subpar. 1 above) and the coaxial cable (subpar. 3 above), for by this method the Commission can gain direct control over reception of television signals insofar as all CATV systems are concerned. It has had an indirect, limited power over CATV systems using microwave. The operator of a microwave facility must get a license from the Federal Communications Commission because he is transmitting radio signals. The Commission has taken the position that it can issue a license with restrictions and conditions as to what the microwave operator can transmit, even though section 326 of the Communications Act prohibits censorship.

If the Congress passes H.R. 13286 it will open the door wide for the Federal Communications Commission to gain jurisdiction over the reception of television and radio signals—jurisdiction positively denied the Federal Communications Commission under the Communications Act as amended in 1934. It will enable the Commission to determine what can be received by the viewers of this Nation from satellite trans-

mittals, as well as local broadcasting stations and network broadcasts. Freedom requires that full freedom of communications and information be preserved and protected. The passage of H.R. 13286 would do irreparable damage to this freedom. The people in the fringe areas of radio and television reception would be at the mercy of the Federal Communications Commission and its rulemaking powers.

. . . .

It is to be noted that the Federal Communications Commission, although previously denying jurisdiction in the field of CATV, in the early months of 1966 completely reversed their position and assumed jurisdiction over all CATV operations. Lawsuits were filed and are now pending. The Federal Communications Commission, no doubt fearing that it had flagrantly overstepped its jurisdiction, came to the Congress to put its stamp of approval on such action. It is asking the Congress at the present time to give it unbridled authority to control every aspect of the CATV business, a power it has never had over the broadcasting business, but which it wants badly—an entirely new concept in governmental regulation.

The Congress of the United States should not abdicate its legislative powers and delegate to a commission the power to write substantive law by rules and regulations promulgated by an appointed body.

If the Federal Government is to enter a new field of regulation, the manner and extent to which this will be undertaken should be definitely and explicitly spelled out by the duly elected representatives of the people of this country in the Congress of the United States and not by a board, a bureau, or a commission wholly and completely insulated from the electorate. *Id.* at 23-25.

The minority views, in respect to the powers of the Commission and its lack of jurisdiction over CATV, were not

disputed by the majority, which merely urged passage of the legislation. A second minority report also strenuously objected to the jurisdictional grab by the FCC.

Community antenna television systems have been around since 1950, and until 1965 the Federal Communications Commission very clearly indicated that it did not pretend to have jurisdiction over the transmission of broadcast signals by cable. In fact it specifically denied having such jurisdiction. Suddenly, however, the Commission did a complete turnabout and argued that it had always possessed authority to regulate cable television as an extension of broadcasting and its recognized interstate character. By a 5 to 2 decision the Commission determined that the Communications Act of 1934 meant something else and something more than it clearly is. When we consider the fact that the makeup of this Federal agency changes rapidly, such action can lead to dangerous consequences.

Apparently uncertain of its ground, the Commission prepared and suggested a most peculair piece of legislation which is H.R. 13286. Even a casual reading of this bill will indicate that it makes no attempt to determine a broad policy under which the CATV industry should develop in conjunction with the broadcasting industry. Instead it merely grants broad authority, throwing the whole problem to the Federal Communications Commission and hoping for the best.

Most of the 30 amendments which were offered by members of the committee during the deliberations on this bill were intended to show the will of Congress and to provide reasonably clear guidelines. They were offered in an attempt to make this bill at least reasonably consistent with past principles for the regulation of industry. They were defeated.

The result of passing H.R. 13286 would be to create havoc within an industry of great importance to the public because the policies adopted by the Commission for its regulation today could well be reversed or radically changed a month or a year hence. There are no general principles to which the industry can point or by which the Congress may oversee the activities of its creature, the Federal Communications Commission.

In the case of broadcasting facilities the Federal Communications Commission must allocate a frequency and issue a license therefor. In the case of community antenna systems there is no provision for licensing, but the bill does grant authority to issue permits for construction. This of course means that construction authority can be denied to any applicant. Under the terms of this bill construction permits would be within the complete discretion of the Commission. In our opinion this grants to the Federal Communications Commission a completely unacceptable and probably unconstitutional power over this industry.

. . . .

There are presently pending lawsuits which will determine whether or not the Federal Communications Commission was right when it first denied having jurisdiction over CATV or whether it was right later when it reversed itself. Also pending are lawsuits to determine the applicability of the copyright laws to material carried by CATV systems. The determination of these matters requires no legislation and little purpose is served in passing such legislation at this time, particularly since it does not purport to lay down realistic policies and guidelines within which regulation of the CATV industry can logically proceed. *Id.* at 26-27.

The bill failed to reach the floor for vote.

APPENDIX D

Legislative History of Section 4(i) of the Communications Act of 1934

Section 4(i) first appeared in H. R. 8301, 73d Cong., 2d Sess. (1934), was carried into S. 2910, and S. 3285, 73d Cong., 2d Sess. (1934), without change, and was finally enacted as section 4(i) of the Communications Act of 1934, 48 Stat. 1066, 47 U.S.C. § 154(i) (1960).

In the Senate Interstate Commerce Committee report on S. 3285, S. Rep. No. 781, 73d Cong., 2d Sess. (1934), there is no specific discussion of section 4(i). And as to the entirely of section 4, the Committee's only comment is:

> Section 4: Provides for a bipartisan commission of five members with terms of 6 years at an annual salary of $10,000. *Id.* at 3.

The House Committee's comments on S. 3285 were equally abbreviated. Like the Senate Committee's report, there is no specific comment on Section 4(i) in the report of the House Interstate and Foreign Commerce Committee on S. 3285, H. Rep. No. 1850, 73d Cong., 2d Sess. (1934). As to the entirety of Section 4, however, the following comment appeared:

> Section 4 provides for a bi-partisan commission of 7 members, holding office for 7-year terms at a salary of $10,000.[1] *It also provides for the appointment of personnel and contains other provisions usual in the case of the creation of a new administrative body.* *Id.* at 5 (emphasis added).

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[1] The 7-member, 7-year-term provisions substituted by the House for the 5-member, 6-year-term provisions proposed by the Senate were accepted by the Conference Committee.

At the same time, however, the Senate Interstate Commerce Committee stated:

> This bill is so written as to enact the powers which the Interstate Commerce Commission and the Radio Commission now exercise over communications. . . .
>
> In this bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communications companies doing a common carrier business, but in some paragraphs the language is simplified and clarified. These variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective. S. Rep. No. 781, *supra,* at 3.

Section 4(i) was evidently derived from Section 17 of the Interstate Commerce Act, 24 Stat. 385, as amended, 49 U.S.C. § 17(3) (1964), and at the hearings on the proposed Communications Act, Interstate Commerce Commissioner McManamy testified:

> Presumably paragraph (i) of the section [4] is intended to cover the same ground as the following provision in section 17(1) of the Interstate Commerce Act:
>
> > "The [Interstate Commerce] Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division of the Commission, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States."

> This is the specific provision under which this [Interstate Commerce] Commission prescribes its rules of practice and the forms of pleadings before it. Paragraph (i) is more general in terms and may be sufficiently broad in scope to cover rules of practice and forms of pleading. Those matters are of such importance, however, that the question of the [Federal Communications] Commission's authority should not be left in doubt. Hearings on H. R. 8301 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 90 (1934); Hearings on S. 2910 Before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 202 (1934).

The only legislative reference to Section 17 of the Interstate Commerce Act (as Section 14 of S. 1532, 49th Cong., 2d Sess. (1886) is found in the remarks of Senator Cullum, the sponsor of S. 1532:

> Section [17] relates to the conduct of the work of the Commission. 17 Cong. Rec. 3474 (1886).

APPENDIX E

Legislative History of Section 303(r) of the Communications Act of 1934, as Amended

Following the unfortunate loss of life as a result of fir at sea on the steamship *Morro Castle* (September 8, 1934) and the further loss of life as a consequence of the sink ing of the steamship *Mohawk* (January 24, 1935), S. Res 63 was introduced in the United States Senate on Januar 28, 1935, 79 Cong. Rec. 1039 (1935). That resolution, amon other things, requested the Senate Committee on Com merce to initiate inquiries into the circumstances of thos two disasters, as well as the broader question of safet of life at sea, and to make recommendations to Congres on what measures might be taken to better insure the safet of life and property at sea in the future. In the word of the Senate Commerce Committee:

> The *Morro Castle* and the *Mohawk* disasters move the Senate of the United States to adopt a resolutio requesting the Committee on Commerce of the Senat or a subcommittee thereof to conduct a study of th causes of these disasters, to make studies which migl throw light on the question of safety of life at se and to make recommendations to the Congress fo greater security of persons and property at se The Committee on Commerce authorized its chairma to organize a Subcommittee of the Department Commerce and Merchant Marine, and this subcon mittee authorized the chairman, Senator Copelan to solicit the aid of technical experts in the wo directed by this Senate resolution. A technical co mittee of such experts was appointed. This gener technical committee gave special consideration the problem of radio, to the part radio plays in t navigation and operation of ships, and to its cont bution to safety. As a result of this study of t problem the bill, which the Commerce Committee n

reports, was prepared and introduced by Senator Copeland. S. Rep. No. 2060, 74th Cong., 2d Sess. 2-3 (1936).

The bill referred to was S. 4619, an amended version of S. 3954, introduced by Senator Copeland on January 11, 1937, the purpose of which was "to modernize our law with respect to radio installations and radio operations aboard ships to the end that safety at sea may be further assured." *Id.* at 1.

The FCC's view of the proposed legislation is found in the testimony of Lt. Commander E. M. Webster before the Senate subcommittee considering the measure:

> The primary purpose of the recommended legislation is to replace and modernize the Ship Act [of 1910, as amended in 1912] dealing with the equipping of ships with radio apparatus and the manning by operators for safety purposes. In view of the close relationship between the Ship Act and the Communications Act, 1934, it is believed both logical and necessary to combine the two in enacting new legislation to replace the Ship Act. Therefore it will be noted that the suggested legislation is in the form of amendments to the Communications Act; otherwise, it would necessitate a repetition of many provisions of the Communications Act in order to form a complete related whole.
>
> Both the Ship Act, enacted 25 years ago, and the Communications Act of 1934 are now inadequate as they do not provide by statute for the full utilization of radio as a major safety factor at sea. . . . Hearings on S. 3954 Before a Subcommittee of the Senate Committee on Commerce, 74th Cong., 2d Sess. 11 (1936). See also, statement of Irvin Stewart, *id.* at 8-9.

The main provisions of the bill were four: (1) A su stantial broadening of the category of ships required have radio communications equipment operated by qualifi operators, as well as radio direction-finder apparatus; (Detailed technical requirements for radio installations board ships, which requirements were in conformity wi those found in the 1929 International Convention on Safe of Life at Sea and the International Telecommunicati Convention; (3) A revision of earlier requirements regar ing the number, qualifications, functions and licensing operators of radio installations on board ships; (4) requirement that every motorized lifeboat required treaty or statute be fitted with radio equipment. *Id.* 3-4. "Other provisions of the bill," stated the Committ "are either redrafts of existing law or involve in t main non-controversial matters." *Id.* at 4.

Among those "other provisions" of S. 4619, Section of the 1934 Communications Act was proposed to amended to add a new subsection (o):

> For the purpose of obtaining maximum effectiven from the use of radio and wire communications connection with safety of life and property, the Co mission shall investigate and study all phases of t problem and the best methods of obtaining the coo eration and coordination of these systems. *The Co mission shall, by proper rules and regulations or conditions incorporated in the authorization or licen prescribe the conditions and procedure to be observ in harmony with the law, in communications involvi safety and property.* [Emphasis added.]

S. 4619 was passed by the Senate and sent to the Hou but was unable to be acted on by that body before t end of that session of the 74th Congress.

During the latter part of 1936, the International C vention on Safety of Life at Sea, London, 1929, was r

ed by the United States. And in the following year, on anuary 11, 1937, a bill essentially the same as the earlier . 4619 was introduced in the first session of the 75th ongress by Senator Copeland as S. 595. Its counterpart the House was H. R. 4191.

The earlier proposed addition of a subsection (o) to ction 4 of the Communications Act was preserved in both ie House and Senate bills. In addition, both bills proosed a new section 360(a) to the Communications Act:

> In addition to any other provision of law, the Commission shall make such rules and regulations, determinations, or findings as may appear to be necessary to give effect to the radio and communications provisions of the safety convention.

his provision was part of a proposed new Part II of itle III of the 1934 Communications Act, entitled "Radio quipment and Radio Operators on Board Ship," the ated purpose for which was ". . . to promote safety of fe and property at sea through the use of radio." S. 95, 75th Cong., 1st Sess. § 351 (1937).

During the hearings before both the Senate and House ommittees considering the measure, the Federal Communitions Commission recommended, among other things, iat the second sentence of section 4(o) and the entirety section 360(a) of the bill be deleted, and a new section 03(r) be substituted, as follows:

> (r) [Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity require shall—] Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty

> or convention insofar as it relates to the use
> radio, to which the United States is or may her
> after become a party. Hearings on H. R. 41
> Before the House Committee on Merchant Mari
> and Fisheries, 75th Cong., 1st Sess. 2-3 (1937
> Hearings on S. 595 Before a Subcommittee of t
> Senate Committee on Commerce, 75th Cong., 1
> Sess. 12 (1937).

The reasons for the suggested change were contain
in a Statement by Anning S. Prall, then Chairman of t
FCC:

> In view of the fact that many of the situatio
> which will confront the Commission as a result
> the ratification of the safety convention and the p
> sage of this bill will be new, that changes in t
> rules and regulations may be desirable from time
> time, and that new international radio agreemen
> doubtless, will be effected in the future, it is i
> portant that the Commission should have author
> generally to prescribe such rules and regulations a
> to impose such restrictions and conditions as may
> necessary to administer the act as amended and exi
> ing or future international agreements concerned w
> radio and wire communication. *Such general author*
> *would permit the Commission to meet promptly a*
> *effectively situations which arise under the safety co*
> *vention, provisions of this bill, and international agr*
> *ments entered into in the future. Ibid.* (emphas
> added).

The bill, as reported out of the Senate Commerce Co
mittee, S. Rep. No. 196, 75th Cong., 1st Sess. (1937), a
as enacted, 50 Stat. 191, adopted the FCC's suggesti

APPENDIX F

FEDERAL COMMUNICATIONS COMMISSION

13345
PUBLIE NOTICE—B
February 28, 1968

WASHINGTON, D. C. 20554

Report No. 7063

BROADCAST ACTION

FCC Expresses Policy Regarding Refusal of Gulfport, Mississippi, Licensee To Accept Out-of-Town Advertising

The Commission has informed E. O. Roden & Associates, Inc., licensee of radio station WGCM, Gulfport, Mississippi, that WGCM's refusal to accept out-of-town automobile advertising ". . . in the circumstances of this case, is contrary to the public interest in that it operates to restrain and inhibit trade and competition . . ."

In a letter to Roden, the Commission requested the licensee to modify its policies and advise the Commission promptly of the action taken.

The Commission, in explaining the basis for its ruling, further stated "It appears from your statements to the Commission that you have a policy of not accepting advertising from automobile dealers located outside of Gulfport and Harrison County. This is not the result of a formal or explicit agreement between you and the Automobile Dealers Association, but you state that the matter has been discussed between your station and the automobile dealers, that the policy was initiated after you were told by local dealers that advertising by New Orleans dealers could create a hardship to the local industry, and that it could be presumed that local dealers might cancel advertising if advertising from other dealers was accepted.

"The antitrust laws of the United States prohibit any contract, combination or conspiracy in restraint of trade or commerce. A refusal to do or accept business from another arising out of such a contract, combination or conspiracy is one of the clearest and most restrictive of the prohibited types of conduct."

Max Fetty and Associates, Inc., a New Orleans, Louisiana, advertising agency, filed a complaint with the Commission on May 15, 1967, stating in part that WGCM agreed to accept advertising from Fetty on behalf of Gerry Lane Chevrolet of Bay St. Louis; aired one of the announcements; and then cancelled the agreement on grounds that Jay Jay Chevrolet-Buick Company in Gulfport had stated it would cancel its advertising unless the Gerry Lane spot announcements were withdrawn. Bay St. Louis is about 18 miles west of Gulfport.

Action by the Commission February 21, 1968, by letter. Commissioners Hyde (Chairman), Loevinger, Wadsworth, and Johnson, with Commissioner Bartley dissenting and issuing a statement, and Commissioner Cox concurring in the result.